HCJ 5658/23
HCJ 5659/23
HCJ 5660/23
HCJ 5661/23
HCJ/5662/23
HCJ 5663/23
HCJ 5711/23
HCJ 5769/23

Petitioner in HCJ 5658/23:	Movement for Quality Government in Israel
Petitioners in HCJ 5659/23:	Tal Oron et al.
Petitioner in HCJ 5660/23:	The Smoke Free Israel Initiative
Petitioners in HCJ 5661/23:	The Civil Democracy Movement et al**.**
Petitioners in HCJ/5662/23:	Yehuda Ressler et al.
Petitioners in HCJ 5663/23:	Israel Bar Association et al.
Petitioner in HCJ 5711/23:	Ometz Movement – Movement for Good Governance, Social and Legal Justice
Petitioner in HCJ 5769/23:	Roni Numa

v.

Respondents in HCJ 5658/23:	1. The Knesset 2. Knesset Constitution, Law, and Justice Committee 3. Government of Israel 4. Attorney General

Respondents in HCJ 5659/23:

1. Knesset Constitution, Law, and Justice Committee
2. Chair of the Knesset Constitution, Law, and Justice Committee
3. Knesset
4. Attorney General
5. Government of Israel

Respondents in HCJ 5660/23:

1. Knesset
2. Government of Israel

Respondents in HCJ 5660/23:

1. Knesset
2. Government of Israel

Respondents in HCJ 5661/23:

1. Knesset
2. Knesset Constitution, Law, and Justice Committee
3. Government of Israel
4. Attorney General

Respondents in HCJ 5662/23:

1. Knesset
2. Minister of Justice

Respondents in HCJ 5663/23:

1. Knesset
2. Government of the State of Israel
3. Knesset Constitution, Law, and Justice Committee

Respondents in HCJ 5711/23:

1. Knesset
2. Government of Israel

Respondents in HCJ 5769/23:

1. Prime Minister of Israel
2. Knesset Constitution, Law, and Justice Committee
3. Knesset Foreign Affairs and Defense Committee

4. Knesset

Amici Curiae: 1. Association for Civil Rights in Israel

2. Adam Teva V'Din – Israeli Association for Environmental Protection

The Supreme Court sitting as High Court of Justice

Before: President (emer.) E. Hayut, Deputy President U. Vogelman, Justice I. Amit, Justice N. Sohlberg, Justice D. Barak-Erez, Justice (emer.) A. Baron, Justice D. Mintz, Justice Y. Elron, Justice Y. Wilner, Justice O. Groskopf, Justice A. Stein, Justice G. Canfy-Steinitz, Justice G. Kabub, Justice Y. Kasher, Justice R. Ronen

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[2] HCJ 129/57 *Manshi v. Minister of Interior*, IsrSC 12, 209 (1958)

[3] CA 311/57 *Attorney General v. M. Dizengoff & Co., Ltd*., IsrSC 13, 1026 (1959)

[4] HCJ 332/62 *Schpanier v. Minister of the Finance*, IsrSC 17, 574 (1963)

[5] CA 492/73 *Speiser v. Sports Betting Board*, IsrSC 29(1) 22 (1974)

[6] HCJ 156/75 *Dakka v. Minister of Transportation*, IsrSC 30(2) 94 (1976)

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[10] HCJ 3823/22 *Netanyahu v. Attorney General*, (July 17, 2023)

[11] HCJ 935/89 *Ganor v. Attorney General*, IsrSC 44(2) 485 (1990)

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[14] HCJ 3997/14 *Movement for Quality Government in Israel v. Minister of Foreign Affairs*, (Feb. 12, 2015)

[15] HCJFH 3660/17 *General Association of Merchants and Self-Employed Persons v. Minister of the Interior*, (Oct. 26, 2017)

[16] HCJ 4999/03 *Movement for Quality in Government in Israel v. Prime Minister*, (May 10, 2006)

[17] HCJ 3017/12 *Terror Victims Association v. Prime Minister*, Feb. 4, 2013)

[18] HCJ 3975/95 *Kaniel v. Government of Israel*, IsrSC 53(5) 459 (1999)

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Judgment

(January 1, 2024)

President (emer.) E. Hayut:

1. Since the founding of the state, the courts have been conducting judicial review over *all the bodies of the executive branch* without exception, in accordance with the administrative causes for review developed in the case law over the years. A dramatic event occurred in Israeli law on July 24, 2023. On that day, in a second and third reading, the Knesset plenum approved Basic Law: The Judiciary (Amendment no. 3) (hereinafter, respectively: *the Basic Law* and *the Amendment*), according to which, sec. 15(d1) was added as follows:

> Notwithstanding what is stated in this Basic Law, a holder of judicial authority under law, including the Supreme Court sitting as the High Court of Justice, shall not address the reasonableness of a decision by the Government, the Prime Minister or a Government Minister, and will not issue an order in such a matter; in this section, "decision" means any

decision, including in matters of appointments, or a decision to refrain from exercising authority.

In other words, the amendment establishes that the courts – including the Supreme Court sitting as High Court of Justice – no longer hold jurisdiction to conduct judicial review of the reasonableness of decisions made by the Government, the Prime Minister, and the ministers.

2. Shortly after the adoption of the Amendment, the eight petitions before us were filed. The primary relief requested is that we order that the Amendment is void. This, it is argued, in view of its severe harm to the core characteristics of the State of Israel as a democratic state, due to the abuse of the Knesset's constituent authority, and due to defects in the legislative process. The Attorney General supports the position of the Petitioners and is also of the opinion that the Amendment should be declared void, while the other Respondents argue that the petitions should be dismissed. Given the importance of the issues raised in these petitions, we held an unprecedented *en banc* hearing by all fifteen justices of the Supreme Court.

At the outset, prior to addressing the various issued raised by the petitions, I have decided to provide a brief survey of the development of the reasonableness standard in Israeli law, and to present the course of events that led up to the enactment of the Amendment that is the subject of the petitions.

Background

A. The Reasonableness Standard in Israeli law

3. The reasonableness standard has been one of the grounds for administrative review since the earliest days of Israeli law. The source of this standard is to be found in English administrative law, where it was originally employed primarily for examining the lawfulness of bylaws (DAPHNE BARAK-EREZ, ADMINISTRATIVE LAW, vol. II, 723 (2010) [Hebrew] (hereinafter; BARAK-EREZ, ADMINISTRATIVE LAW)). The English case generally referred to as the central one in this regard is *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp*. [157] (hereinafter: *Wednesbury*), which held that when an authority makes a decision that is so unreasonable that no reasonable

authority could ever have come to it, the court will intervene. As was explained, this concerns decisions that cannot be seen as falling within the powers granted to the authority. Examples of such decisions were given in the judgment in regard to situations as, for example, a person being dismissed because of the color of her hair or where the authority considers extraneous matters in making its decision. In other words, in its original English version, the reasonableness standard was intended to contend with decisions that were illogical or arbitrary, or that comprised other serious flaws in the exercise of discretion, such as irrelevant considerations (see: BARAK-EREZ, ADMINISTRATIVE LAW, 723; Margit Cohn, "Unreasonableness in Administrative Law: Comparative Aspects and Some Normative Comments," in THEODORE OR BOOK 773, 778-782 (Aharon Barak & Ron Sokol, eds., 2013) [Hebrew] (hereinafter: Cohn, "Comparative Aspects")).

4. In the beginning, the reasonableness standard was applied in our legal system in a manner similar to that of traditional English law (I. ZAMIR, ADMINISTRATIVE POWER, vol. V, 3550-3551 (2020) [Hebrew] (hereinafter: ZAMIR, ADMINISTRATIVE POWER)). Thus, when the Court was asked to void a municipal bylaw for retroactivity, it was held that it should be done in accordance with the criterion that examines whether the retrospective provision "is illogical or unacceptable" to the point that it can be said that the legislature never empowered the authority to make it (HCJ 21/51 *Binenbaum v. Tel Aviv Municipality* [1] 385-386 (hereinafter: *Binenbaum*); and also see: HCJ 129/57 *Manshi v. Minister of Interior* [2] 215). Over the years, it was held that this standard also applies to the decisions of government ministers and to the Government as a whole (CA 311/57 *Attorney General v. Dizengoff* [3] 1031 (hereinafter: *Dizengoff*); HCJ 332/62 *Schpanier v. Minister of the Finance* [4]; CA 492/73 *Speiser v. Sports Betting Board* [5] 26).

5. At that stage, the reasonableness standard was viewed as a cause that was strongly tied to that of deviation from authority, much as it had been in its English sources. Thus, in *Dizengoff*, it was noted that it is difficult to distinguish substantially between the test of reasonableness and other tests for examining an administrative act, such as lack of good faith, improper considerations, extraneous objectives. It was further noted that, in practice, all of these tests are nothing more than specific instances of abuse of power (*ibid.*, 1038).

6. The foundation for establishing reasonableness as an independent ground for review distinct from the other causes for review of administrative discretion was first laid in HCJ 156/75

Dakka v. Minister of Transportation [6]) (hereinafter: *Dakka*)). In that case, Justice M. Shamgar was willing, in principle, to recognize the unreasonableness of an administrative decision, even where it was not tainted by other administrative flaws, in cases in which a proper balance was not stuck among the necessary considerations in the matter, stating:

> […] unreasonableness can also appear alone: for example, there may be circumstances in which the ministerial authority did not weigh any consideration extraneous to the matter, and where only materially relevant considerations were assessed, but the relevant considerations were granted relative weight in such distorted proportions that the final conclusion was so entirely baseless as to be absolutely unreasonable (*ibid*., 105).

7. This broader approach was adopted by this Court in HCJ 389/80 *Dapei Zahav v. Broadcasting Authority* [7] (hereinafter: *Dapei Zahav*)). In that case, Justice A. Barak set out four guiding principles in relation to the reasonableness standard, which in his opinion, reflected both the *lege lata* and the *lege ferenda*. *First*, he explained that the reasonableness standard "[…] stands on its own, and it can serve to invalidate unreasonable administrative discretion even if it is not the result of an arbitrary decision, and even if the decision was made in good faith while considering all of the relevant factors and only those factors" (*ibid*., 439). *Second*, relying, inter alia, upon *Dakka*, Justice Barak held that an administrative decision can be deemed unreasonable it did not grant appropriate weight to various interest that the authority had to consider in making the decision (*ibid*., 445-446). In that regard, Justice Barak pointed to several early judgments in which, although they did not use the word "reasonableness", the Court intervened in an administrative decision when it found that the balance struck by the administrative authority among the various considerations was unreasonable (e.g., HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [8] 892 (hereinafter: *Kol Ha'am*)). *Third*, he explained that unreasonableness had to be examined in accordance with objective criteria ("the reasonable public servant"), and that the reasonableness principle establishes a range of reasonable possibilities within which the Court will not intervene in a decision of an administrative authority and will not substitute its discretion for that of the authority (*Dapei Zahav*, 439-443). *Fourth*, it was noted that for the purpose of judicial intervention in an administrative decision, it is necessary to find material or extreme unreasonableness that goes to the very root of the matter (*ibid*., 444).

Justice M. Ben-Porat concurred in the opinion of Justice Barak according to which reasonableness could serve as the sole justification for judicial intervention. President M. Landau was of the opinion that there was no need to broaden the reasonableness standard such that the balance among the various considerations in the administrative decision would also be examined. However, President Landau explained that, in practice, the difference between his position and that of Justice Barak was not significant, and that it was largely "a matter of terminology" (*ibid*., 432).

8. Since *Dapei Zahav*, and for over four decades, it has been settled law that reasonableness is a distinct, independent ground, along with the other distinct grounds for examining *administrative discretion* (such as extraneous considerations, proportionality and discrimination), and that it "no longer signifies only arbitrariness or an absolute lack of sense in the decision" but rather "examines the internal balance struck by the authority among the considerations" (BARAK-EREZ, ADMINISTRATIVE LAW, 724-725). In this framework, the court examines whether the administrative authority weighed all of the materially relevant considerations, and whether it assigned the appropriate relative weight to each of the relevant considerations (see, among many: HCJ 5853/07 *Emunah v. Prime Minister* [9] 486-487 (hereinafter: *Emunah*); HCJ 3823/22 *Netanyahu v. Attorney General* [10] para. 4, *per* Justice Barak-Erez (hereinafter: *Netanyahu*); HCJ 935/89 *Ganor v. Attorney General* [11] 514-516 (hereinafter: *Ganor*)).

This is the reasonableness rule that applied – until the Amendment that is the subject of these petitions – to *all* administrative authorities, including the Government and its ministers (see: HCJ 2624/97 *Ronal v. Government* [12] 77; HCJ 1993/03 *Movement for Quality Government v. Prime Minister* [13] 840 (hereinafter: *Hanegbi 2003*)).

9. Over the years, there has been criticism of this form of reasonableness in both the case law and the literature. The main argument made in this regard is that the standard, in its format since *Dapei Zahav*, creates uncertainty as to the method of its application and that, in practice, it leads to the court substituting its discretion for that of the authority (see, in this regard, the opinion of Justice A. Grunis in *Emunah*, 521-514 and HCJ 3997/14 *Movement for Quality Government v. Minister of Foreign Affairs* [14] para. 29 of his opinion (hereinafter: *Hanegbi 2014*); and see the opinion of Justice N. Sohlberg in HCJFH 3660/17 *General Association of Merchants v. Minister of the Interior* [15] paras. 35-36 (hereinafter: *Merchants Association*) and his article "On

Subjective Values and Objective Judges," 18 HASHILOACH 37 (2020) [Hebrew] (hereinafter: Sohlberg, "On Objective Values") and "The Deri-Pinhasi Rule from the Reasonableness Perspective," The Israel Law & Liberty Forum Blog (Jan. 16, 2022) [Hebrew]; and see: Yoav Dotan, "Two Concepts of Deference and Reasonableness," 51 MISHPATIM 673, 701-703 (2022) [Hebrew]).

Nevertheless, even the standard's critics did not recommend that it be abolished entirely and were of the opinion that the solution to the problems it presents lies in narrowing its scope. Thus, it was suggested, inter alia, that recourse to reasonableness be made only in extreme cases and as a last resort (see the opinion of Justice Grunis in *Emunah*, 524). Another suggestion was that the scope of incidence of "substantive" reasonableness be narrowed, and that it should be applied only to the decisions of the professional echelon, as opposed to decisions of the of the elected echelon that generally reflect a value-based worldview (Sohlberg, "On Objective Values").

10. In any case, over the long years in which the reasonableness standard was developed in the case law, this Court created "a comprehensive corpus of rules and criteria for its application that significantly limited the uncertainty of the rule in its initial abstract form" (*Hanegbi 2014*, para. 4 of my opinion). Thus, insofar as the *identity of the decision maker*, it was held that the more senior the authority, the greater the margin of discretion it is granted (HCJ 4999/03 *Movement for Quality in Government v. Prime Minister* [16] para. 18 of my opinion (hereinafter: HCJ 4999/03)). In particular, it was held that the Court must show greater restraint in all that concerns intervention in a Government decision, in view of "the status of the government as the head of the executive branch that is entrusted with establishing and implementing policy" (HCJ 3017/12 *Terror Victims Association v. Prime Minister* [17] para. 10).

In regard to the *characteristics of administrative authority*, it was held that judicial intervention should be limited in regard to decisions that reflect broad policy (see, e.g., HCJ 3975/95 *Kaniel v. Government* [18] 497; HCJ 6407/06 *Doron v. Minister of Finance* [19] para. 66*, per* Justice E. Arbel); in regard to an exercise of authority that involves weighing political considerations (see, e.g., HCJ 8948/22 *Scheinfeld v. Knesset* [20], para. 52 of my opinion (hereinafter: *Scheinfeld*)); where the decisions reflect the expertise and professionalism of the authorized bodies (see, e.g., CA 4276/94 *Tel Aviv Stock Exchange, Ltd. v. Israeli Association of*

Publicly Traded Companies [21] 739; HCJ 3017/05 *Hazera (1939), Ltd. v. National Planning and Building Council* [22] para. 38, *per* Justice A. Procaccia; HCJ 6271/11 *Delek v. Minister of Finance* [23] para. 11)). In addition, it has long been held that the Court must act with particular caution in examining the reasonableness of regulations, particularly in the case of regulations approved by one of the Knesset's committees (see, e.g., HCJ 4769/90 *Zidan v. Minister of Labor* [24] 172; HCJ 471/11 *Chen Hamakom v. Ministry of Environmental Protection* [25] para 31).

11. In accordance with these principles, the reasonableness standard has been employed by the Court in intervening in administrative decisions in which the balance struck among the various considerations reflected extreme unreasonableness. This, inter alia, in regard to certain *policy* decisions (see: HCJ 8396/06 *Wasser v. Minister of Defense* [26] (hereinafter: *Wasser*); HCJ 244/00 *New Dialogue v. Minister of National Infrastructures* [27]; HCJ 5782/21 *Zilber v. Minister of Finance* [28] (hereinafter: *Zilber*]); in regard to *appointments* in the public service (see: HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [29] (hereinafter: *Eisenberg*); HCJ 3894/93 *Movement for Quality in Government v. State of Israel* [30] (hereinafter: *Deri*); HCJ 4267/93 *Amitai, Citizens for Good Administration and Integrity v. Prime Minister* [31] (hereinafter: *Pinhasi*); HCJ 932/99 *Movement for Quality Government v. Chairman of the Committee for the Examination of Appointments* [32]; HCJ 4668/01 *Sarid v. Prime Minister* [33] (hereinafter: *Sarid*); *Scheinfeld*); in regard to decisions by an interim government (see, e.g.: HCJ 5403/22 *Lavi v. Prime Minister* [34] (hereinafter: *Lavi*)); in regard to specific decisions that infringed individual rights and interests (see, e.g.: AAA 812/13 *Bautista v. Minister of the Interior* [35] (hereinafter*: Bautista*); AAA 662/11 *Sela v. Yehieli* [36] (hereinafter: *Sela*); AAA 5634/09 *Jalal v. Jerusalem Municipality* [37]) and in regard to decisions concerning filing criminal or disciplinary charges (see, e.g.: *Ganor*; HCJ 7150/16 *IRAC v. Minister of Justice* [38]).

B. The Legislative Process of the Amendment

12. On January 1, 2023, six days after the swearing in of the 37th Government, Minister of Justice Yariv Levin gave a speech in which he presented what he referred to as "the first stage of the reform of governance". That plan comprised a number of elements: changing the composition of the Judicial Selection Committee, limiting judicial review of Knesset legislation, changing

certain aspects of the work of the government legal advisors, and abolishing the reasonableness standard.

About a week thereafter, the Minister of Justice sent the Attorney General a draft memorandum regarding Basic Law: The Judiciary (Amendment – Reform in the Law) (hereinafter: *the Draft Memorandum*), which comprised recommendations for legislative changes in regard to the subjects he presented in his speech, among them the recommendation that the Court not void decisions by "the Government, its ministers, an agency under their responsibility, or anyone acting on their behalf" on the basis of their degree of reasonableness. In an opinion presented by the Attorney General's on February 2, 2023, she explained that each of the recommended arrangements in the Draft Memorandum "raises material problems that strike at the heart of the principle of the separation of powers, the independence of the judiciary, protection of individual rights, the rule of law, and the ensuring of good governance". In regard to abolishing the reasonableness standard, the Attorney General noted that this change might lead to significant harm to a citizen's ability to "present the actions of an authority for independent, objective review and obtain relief from the court".

13. In the end, the Draft Memorandum did not advance, and no government bills were submitted on the subjects it comprised. However, in parallel to the Draft Memorandum, on January 11, 2023, the Knesset Constitution, Law, and Justice Committee (hereinafter: *the Committee* or the *Constitution Committee*) began a series of meetings to discuss the various recommendations for changes in the field of law under the rubric "Zion shall be redeemed with judgment – Restoring justice to the legal system" (hereinafter: *the plan for changes in the legal system*). In the session, the Chair of the Committee, Member of Knesset Simcha Rothman, (hereinafter: *MK Rothman*) noted that the amendments that would be addressed by the Committee would include government bills, private member's bills, and bills by the Committee under sec. 80(a) of the Knesset Rules of Procedure, which states:

> The House Committee, the Constitution, Law and Justice Committee, and the State Control Committee are entitled to initiate bills in the spheres of their competence as elaborated in these Rules of Procedure, on the following topics, and prepare them for the first reading: Basic Laws, matters

> that are required due to an amendment of a Basic Law, and are proposed side by side with it, the Knesset, Members of the Knesset, the elections to the Knesset, political parties, party financing, and the State Comptroller.

MK Rothman explained that the first subject that would be brought up for debate concerned the government legal advice system, and that the Committee would be advancing a Basic Law bill in this regard.

14. On January 16, 2023, the members of the Committee were presented with a Preparatory Document by the Committee's legal advisors that explained that the legislative path of submitting a bill by the Committee was a relatively rare procedure and "in the overwhelming majority of cases, it was reserved by the Constitution Committee for subjects that were not controversial or to subjects with a strong connection to the Knesset and its activities" (also see: the statement of the Knesset Legal Advisor, Advocate Sagit Afik (hereinafter: *Advocate Afik*) in the Transcript of meeting no. 7 of the Constitution Committee of the 25th Knesset, 31 (Jan. 16, 2023) (hereinafter: *Transcript of Meeting 7*)). In her opinion of January 25, 2023, Advocate Afik explained that most of the elements in the plan for changing the legal system could advance as a Basic Law bill on behalf of the Committee, but that the Committee had to hold "a significant debate on all the issues and their ramifications". However, in the matter of the legislation concerning the government legal advisors, Advocate Afik decided that the matter was one that should be arranged in regular legislation rather than in a Basic Law, and that it should not proceed as the Committee's bill in view of the fact that it was a matter that clearly concerned the conduct of the Government. After that, the Committee ended its discussion of the bill in regard to the government legal advisors.

15. In the meantime, on January 17, 2023, MK Rothman submitted the Basic Law: The Judiciary (Amendment – Strengthening the Separation of Powers) Bill (hereinafter*: Basic Law Bill – Strengthening the Separation of Powers*). The bill comprised provisions in regard to changing the composition of the Judicial Selection Committee and for restricting judicial review over Basic Laws and statutes. Section 2 of the bill concerned the reasonableness standard. It recommended adding the following provision to the Basic Law:

> Notwithstanding what is stated in this Basic Law, a holder of judicial authority under law, including the Supreme Court sitting as the High Court

> of Justice, shall not hear and shall not issue an order against the Government, the Prime Minister, a government minister, or any other elected official as shall be established by law, in regard to the reasonableness of their decision.

16. In the Committee's meeting on January 22, 2023, MK Rothman presented the bill and noted that, as opposed to the draft published by the Minister of Justice, his bill in regard to the reasonableness standard focused only upon judicial review of the decisions of *elected officials*, which creates a "democratic problem" that, according to him, was also noted in Justice Sohlberg's articles (Transcript of meeting no. 13 of the Constitution Committee of the 25th Knesset, 7 (Jan. 22, 2023)). Pursuant to that, the Committee held a number of additional meetings, which were followed by a vote on Basic Law Bill – Strengthening the Separation of Powers only in regard to the elements of the bill concerning changing the composition of Judicial Selection Committee and limiting judicial review of Basic Laws and statutes. These elements were approved in a first reading by the Knesset plenum on February 20, 2023, and March 13, 2023. On March 27, 2023, the Constitution Committee also approved the bill for changing the composition of the Judicial Selection Committee in a manner that would ensure the representatives of the Government and the coalition a majority on the committee. However, against the background of broad public protests against the plan to change the legal system, the Prime Minister announced that same day that advancing the bill would be delayed for the purpose of conducting negotiations with the representatives of the opposition.

17. When a number of months passed without achieving agreements between the coalition and the opposition, the legislative proceedings for changing the legal system were renewed on June, 20, 2023, and at that stage, MK Rothman submitted the amendment that is the subject of the petitions to the Committee under the title "Basic Law: The Judiciary (Amendment – The Reasonableness Standard) Bill" (hereinafter: *the Amendment Bill*). The new bill was advanced as a Committee bill and its wording was identical to the paragraph regarding reasonableness in Basic Law Bill – Strengthening the Separation of Powers.

18. On June 23, 2023, in advance of the debate on the Amendment Bill, the Attorney General issued a preparatory document (hereinafter: *the Preparatory Document of June 23, 2023*). That

document noted that the Amendment utterly abolished the reasonableness standard in regard to the elected echelon, including reasonableness in the sense of "irrationality" that existed prior to *Dapei Zahav.* In this regard, the Preparatory Document surveyed various problematic aspects of the bill, including the fear of creating "black hole" in areas in which judicial review rests primarily upon reasonableness. The document further noted that the appropriateness of the comprehensive distinction between the elected and professional echelons should be examined, bearing in mind that many of the decisions at the elected echelon are specific decision relating to matters of the individual. It was suggested that an alternative model be considered in which reasonableness would be abolished only in regard to certain types of decisions.

19. Beginning on June 25, 2023, and over the next ten days, the Committee held five debates on the Amendment Bill and its preparation for a first reading. In the course of the debates, MK Rothman rejected suggestions for narrowing the scope of the reasonableness standard instead of abolishing it entirely in regard to the elected echelon, for example, by permitting a limited standard of extreme unreasonableness. MK Rothman explained that "[…] there is a structural problem, and the structural problem is like this: […] there is no way of drawing a line between extreme unreasonableness and non-extreme unreasonableness. There is no way to do it" (Transcript of meeting no. 105 of the Constitution Committee of the 25th Knesset, 7 (June 25, 2023) (hereinafter: *Transcript of meeting 105*)). MK Rothman further explained that the Amendment Bill does not nullify the possibility of judicial review on the basis of other causes like deviation from authority, infringement of rights, and extraneous considerations.

The Committee's legal advisor, Advocate Gur Blay (hereinafter: *Advocate Blay*), noted that the Amendment Bill is an exceptional bill that does not ground the principles of administrative law but only abolishes judicial review on the basis of the reasonableness standard in all that relates to the elected echelon. Advocate Blay emphasized that there are cases in which there are no extraneous consideration or infringed rights and where, in practice, the reasonableness standard is the only response to harm to a citizen, without which a "vacuum of judicial oversight" may result (*ibid*., 115). In this regard, Advocate Blay referred to the many individual decisions that may affect particular individual interests, among them, obtaining a permit, concession or license from the Government. Advocate Blay further noted that even among the critics of the reasonableness standard, the prevailing view is that it should be narrowed rather than abolished, and that this

narrowing should be the product of the case law and not legislation, while leaving the courts a degree of flexibility.

The Deputy Attorney General (Public Administrative Law), Advocate Gil Limon (hereinafter: *Advocate Limon*), conveyed the Attorney General's objection to the bill. Advocate Limon noted that the government's duty to act reasonably is an important guarantee for the realization of the state's democratic values and that the bill effectively exempts the elected echelon from this duty and thereby seriously harms the basic values of Israeli democracy. Advocate Limon further noted that the bill would lead to "the creation of a normative black hole" and emphasized the inherent problem in "absolutely blocking judicial review of unreasonable decisions based exclusively upon the identity of the decision maker in regard to the most important decisions made at the highest level of governmental" (Transcript of meeting no. 108 of the Constitution Committee of the 25th Knesset, 10 (June 26, 2023) (hereinafter: *Transcript of meeting 108*)). Advocate Limon went on to survey the broad consequences of the Amendment Bill, particularly in all that concerned ethical behavior in regard to appointments to public offices, Government actions leading up to elections, and situations in which elected officials intentionally refrain from exercising their authority.

20. In the course of preparing the Amendment Bill for a first reading, the Committee heard the opinions of experts from academia and other representatives of civil society. Thus, for example, Professor Yoav Dotan emphasized that despite his criticism of the reasonableness standard, the Amendment Bill is very sweeping "in the sense of throwing out the baby with the bathwater" (Transcript of meeting no. 114 of the Constitution Committee of the 25th Knesset, 42 (July 4, 2023)). Professor Dotan explained that "[…] the distinction between decisions that are of a political character and those that are not such cannot be based exclusively on the level at which the decision is made […] it is necessary first to distinguish between general policy decisions and individual decisions" (*ibid*.).

21. To complete the picture, it should be noted that in the course of the meetings, Knesset members from the opposition argued that it was not possible to advance the bill under the procedure for submitting a bill on behalf of a committee and that it did not represent a bill that the committee had "initiated and prepared", as required under sec. 80 of the Knesset Rules of

Procedure. On July 2, 2023, Advocate Afik responded to a request by MK Gilad Kariv of the Labor faction (hereinafter: *MK Kariv*) on this subject and noted that she did not see any reason for intervening in the legislative process, and that there was no requirement that the Committee hold a preliminary debate on the question of Amendment Bill as a committee bill.

22. In the end, on July 4, 2023, the Amendment Bill was approved for a first reading as a Basic Law bill on behalf of the Committee by a majority of nine in favor and four opposed. In the explanatory notes presented to the plenum, it was noted, on the basis of a quote from *Dapei Zahav*, that the reasonableness standard currently makes it possible to annul decisions that do not give "appropriate weight to the various interests that the administrative authority is required to consider in its decision" (Basic Law: The Judiciary (Amendment no. 5) (The Reasonableness Standard) Bill, Knesset Bills 5783 110). Inter alia, it was further argued in regard to the use of the reasonableness standard in that sense, particularly in relation to the elected echelon of government, that establishing the balance of values among various considerations "must be given to the public's elected representatives and not to the court" (*ibid*.). The explanatory notes further clarified that the proposed amendment does not prevent the court from conducting judicial review on the basis of other administrative standards, among them that of proportionality.

On July 10, 2023, the bill was approved by the plenum in a first reading by a majority of 64 in favor and 56 opposed.

23. The preparatory stage for a second and third reading began on the following day, and four debates on the bill were held over the next nine days, as well as three debates on objections that had been filed in that regard. In the course of the Committee's debates during this stage of preparation of the Amendment Bill for a second and third reading, the opinions of several legal experts and professionals were heard. During the meeting on July 11, 2023, the legal advisor of the Ministry of Finance, Advocate Assi Messing, warned of the consequences of the bill and referred, inter alia, to its significance in regard to the appointment and dismissal of senior gatekeepers and to the fact that the bill would allow the Minister of Finance to intervene in professional decisions, contrary to the existing procedures in the Ministry of Finance.

24. On July 12, 2023, the Committee addressed various possibilities for "softening" the application of the bill. Advocate Blay emphasized that the proposed framework was far more

sweeping than other frameworks presented by those who had appeared before the Committee, in that it did not distinguish between different types of decisions by the elected echelon and did not allow for the possibility of intervening in "irrational" decisions. Advocate Blay pointed in particular to three subjects in which "more delicate and carful models" should be considered: intervention in the decisions of an interim government, appointments, and infringements of individual interests that do not infringe rights (Transcript of meeting no. 121 of the Constitution Committee of the 25th Knesset, 11-13 (July 12, 2023) (hereinafter: *Transcript of meeting 121*)). In that meeting, Advocate Limon emphasized that the Amendment Bill is "the most extreme bill possible for addressing the reasonableness standard" and noted that although the scope of cases in which the Court intervened in governmental decisions on the basis of reasonableness was not large, the standard had a very significant effect on the development and formulation stages of the decisions of government ministers (*ibid*., 34 and 39). Advocate Limon further noted the most serious and significant harm deriving from the Amendment Bill was to the gatekeepers in all that related to their appointment and the possibility of their dismissal for political reasons.

That same day, a new draft of the amendment was distributed to the members of the Committee, which was the draft ultimately adopted. The draft included the removal of the wording in regard to the application of the section to "any elected official as shall be established by law" and the addition of a clarification of the scope of its application to the end of the original bill:

> Notwithstanding what is stated in this Basic Law, a holder of judicial authority under law, including the Supreme Court, shall not address the reasonableness of a decision by the Government, the Prime Minister or another minister~~, or of any other elected official as shall be established by law~~, and will not issue an order ~~against any of them~~ in such a matter*; in this section, "decision" means any decision, including in matters of appointments, or a decision to refrain from exercising authority.*

25. On July 13, 2023, the Committee held a third debate on the Amendment Bill in preparation for a second and third reading. In the course of that debate, the representative of the Attorney General, Advocate Avital Sternberg, argued that the changes introduced to the amendment constituted its "aggravation". This was the case because the amended bill granted immunity to

judicial review only to those holding the greatest governmental power, and according to it, the amendment also applies to individual decision and not just to fundamental policy decisions.

In the course of the debate, MK Rothman noted that there was no need for grounding the duty of ministers to act reasonably in the Basic Law, and there was no need for a distinction between individual decisions and policy decisions or between unreasonableness and extreme unreasonableness inasmuch as such distinctions "don't work in the real world" (Transcript of meeting no. 125 of the Constitution Committee of the 25th Knesset, 15 (July 13, 2023) (hereinafter: *Transcript of meeting 125*)). As for the application of the Amendment Bill to decisions by a civil servant to whom the minister's authority had been delegated, MK Rothman and Advocate Blay agreed that the identity of who actually made the decision should be examined, and if the person who made it was not the minister, the amendment would not apply. Advocate Blay noted, however, that this would not suffice to neutralize the incentive for the minister to make the decision in order to render it immune to judicial review. MK Kariv noted that the Amendment Bill was extreme in three ways: it did not apply exclusively to the government acting as a whole, but also to all decisions by ministers; it did not distinguish between policy decisions and individual decisions; and it did not suffice by returning the reasonableness standard to its former scope prior to the *Dapei Zahav* decision but entirely abolishes it.

At the end of the meeting held on July 16, 2023, MK Rothman announced that objections to the Amendment Bill could be submitted until the following morning.

26. At the Committee's meeting on July 17, 2023, Advocate Afik noted that an unprecedented number of more that 27,000 objections had been submitted in regard to the Amendment Bill, and referred to the guideline of the Knesset's legal advisor in regard to "Debating and Voting upon Objections in the Preparation of Bills for a Second and Third Reading" (Aug. 1, 2021) (hereinafter: *the Objections Protocol*), that was intended to contend with situations in which thousands of objections were submitted. Advocate Afik presented a number of possibilities for addressing the objections but suggested that in view of the exceptional number, if the members of the opposition preferred one of the possibilities, the Committee chair should adopt that one. When no agreement was reached between the coalition and the opposition, MK Rothman chose the option according to which there would be a summary presentation of all the objections, and following that, a vote

would be held on the objections in groups of 20 at a time. The explanation of the objections took some 18 additional hours. In the end, all of the objections were defeated, and on July 19, 2023, the Committee approved the Amendment Bill by a majority vote of nine in favor and seven opposed. Objections raised by several members of the opposition factions in regard to defects in the Committee's vote were rejected by Advocate Afik.

On July 19, 2023, a debate was held in the Knesset House Committee on the application of sec. 98 of the Knesset Rules that allows the House Committee to lay down special procedures for debates on budget laws and "in other exceptional cases", including laying down a framework for the debate, and the length of speeches in the plenum. The Knesset House Committee ruled that members of the opposition could explain their objections over the course of 26 hours, after which a vote on 140 objections would be held in the plenum at the choosing of the opposition. On July 23, 2023, the debate began in the Knesset plenum, and on July 24, 2023, the bill was approved in a third reading by a majority of 64 members of Knesset without opposing votes, after the opposition factions boycotted the vote.

The Amendment came into force on July 26, 2023, upon its publication in the Official Gazette.

The Petitions

27. Eight petitions against it were filed shortly after the approval of the amendment to the Basic Law, all of which asked the Court, inter alia, to declare the amendment void. The petitions were filed by civil society organizations and by individuals, and one was filed by the Israel Bar Association (the Petitioner in HCJ 5663/23). A decision by Justice D. Mintz on July 26, 2023, dismissed requests for an interim order to prevent the Amendment's entry into force until the issuing of a decision on the petitions, and seven of the petitions were set for a hearing before a panel. An additional petition that was subsequently filed in HCJ 5769/23 (hereinafter: *the Numa Petition*) was joined with the other seven petitions, and addressing additional petitions against the Amendment submitted thereafter was put on hold until the issuing of a decision on the petitions before us.

On July 31, 2023, I ordered that the petitions be hard before an expanded panel of 15 justices, and on August 9, 2023, the panel granted an order nisi as requested in the petitions for the sake of the efficient handling of the petitions and without expressing any position on the merits. In a decision issued that same day, we ordered the joining of the organization "Adam Teva V'Din – Israeli Association for Environmental Protection" (hereinafter: *Adam Teva V'Din*), the Association for Civil Rights in Israel, and 37 additional civil-rights organizations (hereinafter, for simplicity: *the Association*) as amici curiae.

28. In preparation for the hearing of the petitions, the Respondents filed Affidavits in Response on their part. The Attorney General presented the position that the Amendment strikes a mortal blow to the fundamental principles of democracy, that the petitions should be granted, and that the Amendment should be declared void by reason of the Knesset's deviation from the bounds of its constituent power and abuse of that power. As opposed to that, the Government, the Prime Minister and the Minister of Justice (hereinafter: the *Government Respondents*) – who were represented by counsel independent of the Office of the Attorney General – and the Knesset and MK Rothman – who were represented by counsel independent of the Office of the Knesset Legal Advisor – argued that the Court lacked jurisdiction to intervene in the Amendment and that even on the merits, there were no grounds for intervening therein.

29. On September 12, 2023, we heard the parties' oral arguments. In the course of the hearing, the parties addressed the issues of principle concerning the conducting of judicial review over Basic Laws and the specific amendment at the focus of the petitions at length. At the end of the hearing, we permitted the Knesset and the Government Respondents to submit Supplemental Briefs in writing in regard to a number of issues that arose in the course of the hearing. The Supplemental Brief of the Government Respondents was submitted on October 16, 2023, and that of the Knesset on November 9, 2023.

Summary of the Arguments of the Parties

30. The main argument of the Petitioners is that the amendment that is the subject of the petitions is an "unconstitutional constitutional amendment" and that it must, therefore, be declared

void. In this regard, the Petitioners refer to this Court's holdings in HCJ 5555/18 *Hasson v. Knesset* [39] (hereinafter: *Hasson*) that stated that the constituent authority is not authorized to deny the core characteristics of the State of Israel as a Jewish and democratic state, but which did not decide upon the question of the Court's jurisdiction to conduct judicial review in that regard. The Petitioners are of the opinion that jurisdiction is necessary by virtue of the institutional role of the Court in our system, due to the absence of a fixed procedure for legislating Basic Laws and for their amendment, and due to the structural weakness of the separation of powers in Israel. It was further argued that sec. 15 of the Basic Law, which sets out the broad jurisdiction of the High Court of Justice to grant relief "for the sake of justice" and to issue orders to "all state authorities" should also be viewed as a source of authority for review of the constituent authority. Not recognizing the jurisdiction of the Court in this regard, it is argued, means that any legislation by the Knesset enacted by a transient coalition majority would be immune to judicial review by means of labelling it a "Basic Law" even if it comprises a denial of the core characteristics of the State of Israel.

31. According to the Petitioners, the amendment that is the subject of the petitions seriously infringes the nuclear characteristics of Israel as a democratic state. First, it is argued that the Amendment infringes the principle of the rule of law, in that it permits the elected echelon to act however it wishes, without judicial oversight. According to the Petitioners, the significance of the Amendment is the effective abolition of the duty of the Government and its members to act reasonably. Second, the Petitioners argue that the Amendment severely infringes the separation of powers in that it concentrates unprecedented governmental power in the hand of the Government. It is further argued that, in practice, the Amendment denies the right of access to the courts in regard to many administrative decisions. The amici curiae went into detail in this regard as to the important rights and interests that could not, in their opinion, be protected in the absence of the reasonableness standard.

The Petitioners add that the harm caused by the Amendment is particularly severe in view of Amendment's broad language, which entirely denies the reasonableness standard in regard to every type of decision by the Government and its ministers, including decisions in concerning the individual, for which there is no justification that they be immune from judicial review. It is further argued that that there are entire areas in which the only limit upon the Government's power is the reasonableness standard, among them the area of appointments and dismissals in the civil service

and decisions made during period leading up to elections. The Numa petition further notes that the Amendment will seriously harm the ability of members of the armed forces to defend themselves against being charged for breaches of the rules of international law.

The Petitioners also ask that the Court take note of the fact that, in parallel to the Amendment, additional steps are being advanced as part of a comprehensive plan for changing the legal system that is intended to weaken and seriously harm its independence and grant absolute power to the coalition majority.

32. The Petitioners further argue that the Amendment should also be voided as an instance of abuse of constituent power. According to the Petitioners, the Amendment, as enacted, does not meet the supplementary tests established in HCJ 5969/20 *Shafir v. Knesset* [40] (hereinafter: *Shafir*) for identifying a constitutional norm. In this context, the Petitioners focus upon the generality test and the test of compatibility to the constitutional fabric. In regard to the generality test, it is argued that the Amendment – which went into immediate force – is a personal amendment primarily intended to benefit the current Government and grant it the ability to act without oversight. As for the compatibility test, it is argued that there is nothing in the Basic Laws that is anything like the provision treating of the abolition of a cause of action or a specific standard of judicial review, and that such a provision should be enacted in a regular statute. In the absence of any justification for grounding the provision in a Basic Law – other than the desire to make it immune to judicial review – it is argued that the Amendment should be decreed void. Alternatively, some of the Petitioners ask that the Amendment's entry into force be postponed until the next Knesset.

33. The Petitioners also claim that there were defects in the legislative process that also justify voiding the Amendment. Thus, they argue that the Amendment Bill could not be advanced as a bill on behalf of the Constitution Committee under sec. 80 of the Knesset Rules, and that the choice of that path was intended to circumvent the established arrangements that apply to government and private member's bills. The Petitioners further argue that there was also a substantive flaw in the principle of the participation of the members of the Knesset as defined in HCJ 10042/16 *Quintinsky v. Knesset* [41] (hereinafter: *Quintinsky*). In that regard, it is argued that the debates upon the Amendment were conducted over only three weeks, without a comprehensive debate upon the

consequences of the Amendment, among them the consequences for the armed forces and state security; that in the course of the debates the participants were subjected to insults and denied the right to speak, in a manner that undermined their ability to participate in the legislative process; that the use of sec. 98 of the Knesset Rules, which is intended to shorten the debate on bills in extraordinary, extreme circumstances, also undermined the legislative process.

34. As noted, the Attorney General supports the view of the Petitioners and is of the opinion that the Amendment should be declared void. In her opinion, this Court's jurisdiction to conduct judicial review over the content of Basic Laws should be recognized. Like the Petitioners, the Attorney General is of the opinion that such jurisdiction derives from the institutional role of the High Court of Justice to ensure that state authorities – including the constituent authority – do not deviate from their authority, and that its source is in the jurisdiction of the Court to grant relief under sec. 15(c) of the Basic Law. In this regard, the Attorney General also refers to the excessive ease by which Basic Laws can be constituted and to the unique institutional structure of the State of Israel and argues that in the absence of judicial review there is no way to contend with a constitutional amendment that denies the nuclear characteristics of the State of Israel as a Jewish and democratic state.

35. The Attorney General is of the opinion that the amendment that is the subject of the petitions is an exceptional case for which there is no recourse other than the Court's intervention, inasmuch as it is an unprecedented amendment that strikes a mortal blow to the existing safeguards for restraining the power of the majority. According to the Attorney General, we are concerned with a sweeping amendment that applies not only to broad policy decisions but also to many ministerial decisions that are of a clearly professional, practical nature. It is further argued that as opposed to the arguments voiced by the supporters of the Amendment in the Committee's debates, parliamentary oversight cannot serve as an effective alternative to judicial review on the basis of reasonableness, and that other standards – like that of proportionality – are insufficient for filling the "normative void" created by the abolition of the reasonableness standard.

The Attorney General adds that the Amendment severely harms the rule of law, in that it places the elected echelon "above the law", considering that the courts – and as a result, the government legal-advice system – are left without effective tools for overseeing that the

Government and the ministers fulfil their duty to act reasonably. In her opinion, the Amendment may lead to irreversible harm to the independence of the gatekeepers, fundamentally change the core character of the of the civil service, and could harm equality in the electoral system, inasmuch as the ruling Government would be free to employ its power and resources during the period leading up to the elections without the Court being able to examine the reasonableness of its decisions. The Attorney General emphasizes that the Amendment *itself* strikes a mortal blow to the core characteristics of the state's democratic regime. The Attorney General adds that note should also be taken of the fact that the Amendment is part of a broader plan to change the legal system, which may cause irreversible harm to the Court's ability to fulfil its constitutional role in a democratic state.

36. Like the Petitioners, the Attorney General further argues that the Amendment was enacted through an abuse of constituent power, while primarily emphasizing in this regard its not meeting the constitutional-fabric test. She argues that grounding a provision that abolishes a specific standard of judicial review in regard to the Government and its ministers in the Basic Laws is foreign to the overall constitutional fabric. There is good reason why limitations upon the authority of judicial institutions have, until now, been enacted in regular statutes and regulations. The Attorney General emphasizes that grounding the Amendment in a Basic Law does not allow for a review of its constitutionality by means of the tests of the limitation clause. The Attorney General adds that the Amendment also presents a problem in terms of the generality test and the distinction test.

37. According to the Attorney General, it is questionable whether the Petitioners' arguments in regard to defects in the legislative process would justify voiding the Amendment, but those defects aggravate the other defects in the Amendment. Lastly, the Attorney General notes that while an interpretive solution would generally be preferable to voiding of the Amendment, in the present matter, the Amendment cannot be interpreted in a manner that would leave it in force without the Court rewriting the Amendment. Therefore, and in the absence of alternative remedies that could rectify the severe defects in the Amendment, the Attorney General is of the opinion that there is no alternative to declaring it void.

38. As opposed to this, the Knesset is of the opinion that the petitions should be dismissed. The Knesset argues that this Court lacks jurisdiction to conduct judicial review over Basic Laws, inter alia, in view of the absence of any clear authorization for such review and the absence of any provisions restricting the constituent authority in constituting Basic Laws. The Knesset emphasizes that sec. 15 of Basic Law: The Judiciary cannot be taken as a source of authority for judicial review of other norms that are also grounded in Basic Laws. In addition, the Knesset argues that conducting judicial review over Basic Laws undermines the basis for conducting judicial review of primary legislation, and that the Court must not establish principles that place limits upon the constituent authority that were not established by the sovereign (the people). The Knesset adds that inasmuch as the Israeli constitutional project has yet to be completed, the theories put forward to ground the doctrine of an unconstitutional constitutional amendment are inappropriate to Israel. Therefore, it is argued that even if there are limitations upon the constituent authority, the Court should not be permitted to oversee their being abided.

39. In any case, the Knesset is of the opinion that the petitions should be dismissed *in limine* for lack of ripeness, as no factual foundation has been formed for examining the consequences of the Amendment. It argues that the language of the Amendment is ambiguous, and it is not yet clear how it will be interpreted by the courts. In addition, it is not yet clear whether the Knesset has the ability to employ parliamentary tools to enforce the reasonableness duty that continues to apply to the Government and the ministers. The Knesset further argues that the petitions are also not ripe because the implementation of the Amendment is dependent upon the conduct of the Government and the ministers in the new legal situation.

40. Should the Court choose to decide upon the question of the constitutionality of the Amendment at this time, the Knesset is of the opinion that it does not reach the level of an unconstitutional constitutional amendment, inasmuch as it does not harm the core of the nuclear characteristics of the state. In this regard, it is argued that in the course of the Committee's debates, the Knesset legal advisors noted the problems that arise from it and suggested alternative wordings for the Amendment, but not accepting the said recommendations does not mean that the Amendment, as approved, is unconstitutional. The Knesset is of the opinion that the threshold for conducting judicial review over the content of basic legislation must be higher, similar to the criteria for disqualifying candidates for election to the Knesset under sec. 7A(a) of Basic Law: The

Knesset. In the matter before us, it is argued, we are concerned with an amendment that does not entirely deny the judicial review of decisions by the Government and its ministers, but concerns only the abolition of the reasonableness standard, which continues to apply in regard to other governmental agencies. It was further noted that judicial review in regard to the Amendment cannot be based upon the assumption that it is part of a broad, comprehensive process of future changes that would harm the democratic identity of the state.

The Knesset adds that it is possible to narrow the scope of the Amendment's application through interpretation. In its view, it can be interpreted in a manner that it would not apply to irrational decisions that could have been voided even prior to *Dapei Zahav*. The Knesset further notes that new judicial tools can be developed for judicial review in the area of appointments and dismissals and in regard to the decisions of an interim government.

41. The Knesset emphasizes that the Amendment does not represent an abuse of constituent power because it is a general, stable, and abstract amendment that is appropriate, in its view, to the existing constitutional fabric. As for the Amendment's immediate entry into force, it is argued that while it is preferable that the application of Basic Laws in regard to the regime be forward looking, in practice many such amendments were enacted with immediate effect and the case law has already made it clear that this fact alone is insufficient grounds for voiding a Basic Law. As for the constitutional-fabric test, the Knesset notes that the "natural place" for establishing rules in regard to judicial review by the Court is Basic Law: The Judiciary, and there is nothing wrong with an amendment that provides an answer to a specific issue and that does not address all of the aspects of judicial review over administrative decisions.

42. Lastly, the Knesset argues that there was no defect in the legislative process that would justify voiding the Amendment, even though "it was possible to adopt a better legislative procedure than the one actually followed" (para. 224 of the Knesset's Affidavit in Response). Thus, it is argued that it was possible to advance the Amendment Bill as a bill on behalf of a committee in accordance with the Knesset Rules and that arguments raised in regard to the principle of participation do not even minimally meet the test established in *Quintinsky* for voiding a law on that basis.

43. The Chair of the Constitution Committee, MK Rothman, concurs with the Knesset's position that this Court lacks jurisdiction to conduct judicial review of Basic Laws, and in his opinion, debates concerning Basic Laws should be conducted in the Knesset alone. In the course of the hearing on Sept. 12, 2023, MK Rothman addressed the possibility of narrowing the scope of the Amendment through interpretation, which was suggested in the Knesset's response, and emphasized that he does not agree with such a position and that in his view, the Amendment deprives the Court of jurisdiction to consider and decide upon arguments that relate to the reasonableness of Government and ministerial decisions in any manner (pp. 37-39 of the Transcript of the hearing).

44. The Government Respondents argue that the petitions should be dismissed while establishing in principle that there can be no judicial review of Basic Laws. In their view, since the Court established that the it draws its jurisdiction to conduct judicial review of legislation from the Basic Laws, it cannot address their validity, and this is particularly the case in regard to Basic Law: The Judiciary. The Government Respondents note that adopting a doctrine of unconstitutional constitutional amendments in our system would make the State of Israel the only state in which it is possible to apply judicial review to constitutional amendments in the absence of an "eternity clause" in the constitution and in the absence of a complete constitution. In the opinion of the Government Respondents, "in Israel there are no substantive limitations upon the constituent authority" (para. 255 of the Affidavit in Response of the Government Respondents), and it is not possible to rely upon the fundamental principles of the system, the values of the State of Israel as a Jewish and democratic state, or on the values of the Declaration of Independence – which does not constitute a binding legal source – as grounds for justifying judicial review of the content of Basic Laws.

The Government Respondents further argue that the amendment that is the subject of the petitions is part of a "legitimate constitutional dialogue" between the governmental branches and it is a very far cry from causing harm to the minimum requirements of Israel as a Jewish and democratic state. According to the Government Respondents, limiting judicial review does not present any constitutional problem, particularly when it does not concern basic rights and where it only concerns limiting the use of only one administrative standard. The Government Respondents incidentally note that there is no substance to the arguments raised in the Numa petition in regard

to an increased danger of bringing international criminal charges against members of the armed forces as a result of the Amendment, and in any case, the Court does not have jurisdiction to decide whether a law or a Basic Law is good and proper in terms of its significance.

45. As for the arguments concerning abuse of constituent power, the Government Respondents note that the tests established in *Shafir* are not binding precedent, and that the doctrine should not be adopted in our system. In any case, it is argued that the Amendment does not violate the tests for identifying a constitutional norm that were established in *Shafir*. In their opinion, we are concerned with an amendment that is stable, not enacted as a temporary provision, that applies generally and comprehensively to all future Governments, and that is appropriate as an amendment to Basic Law: The Judiciary, which establishes the scope of the Supreme Court's jurisdiction to issue orders to governmental authorities. The Government Respondents also reject the possibility of judicial review over the procedure for enacting Basic Laws, but emphasize that, in any event, the procedure for enacting the Amendment does not "even come close" to the circumstances addressed in *Quintinsky*.

In regard to the remedy, the Government Respondents explain that there is no place for an affirming interpretation that would change the meaning of the Amendment as it arises from the language of the law and the debates in the Knesset. In their view, the result of the Amendment is that "there is no longer any possibility for judicial review on the basis of the reasonableness standard of any kind", including in regard to decisions that are unreasonable in the extreme or utterly irrational (para. 45 of the Government Respondents Supplemental Brief). It was additionally argued that there is no basis for granting relief in the form of cancelling the Amendment's immediate entry into force.

Examination and Decision

46. The proceedings before us raise two primary questions. *The first question* is whether it is possible to conduct judicial review of the *content* of Basic Laws when it is argued that the Knesset deviated from its constituent power. This is a complex question, and until now, the Court has refrained from deciding it. But it is now the basis of the petitions and requires an answer. In

practice, even the Government Respondents, who believe that the petitions should be dismissed, are of the opinion that this matter of principle should be decided.

The second question, for which the answer is dependent upon the answer to the first question, is whether the amendment that is the subject of the petitions – Amendment no. 3 to Basic Law: The Judiciary – should be voided. In this context, we must address the list of defects that, according to the Petitioners and the Attorney General, justify voiding the Amendment, first among them the argument that it severely harms the core character of the State of Israel as a democratic state and that the Knesset exceeded its constituent power in adopting it.

I will address these questions in their order, and accordingly, I will first address the question of principle in regard to conducting judicial review of Basic Laws.

Part I: Judicial Review of Basic Laws

A. The Power to adopt a Constitution

47. In order to conduct a comprehensive examination of all that relates to conducting judicial review upon the constituent power of the Knesset, we must again examine the sources of that power and its substance. These aspects have been explained more than once in the case law of this Court and in the legal literature (see, inter alia, CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* [42] (hereinafter: *Mizrahi Bank*); Aharon Barak, "The Declaration of Independence and the Knesset as a Constituent Authority," 11 HUKKIM 9 (2018) [Hebrew] (hereinafter: Barak, "Declaration of Independence"); Rivka Weill, "United Mizrahi Bank's Twentieth Anniversary: On the Piquant Story of the Hybrid Israeli Constitution," 38 IYYUNEI MISHPAT 501, 501-570 (2016) [Hebrew] (hereinafter: Weill, "Hybrid Constitution")). I will therefore suffice with a brief survey.

48. The Israeli constitutional project began on Friday evening, 5 Iyar 5708 (May 14, 1948), when, at a session of the People's Council, David Ben Gurion read one of the most important documents in our history: The Declaration of the Establishment of the State of Israel (hereinafter: *Declaration of Independence*). Along with setting out the historical and international justification

for the establishment of the state and presenting its vision, the Declaration included an "operative part" (Barak, "Declaration of Independence", 13):

> Accordingly we, members of the People's Council, representatives of the Jewish Community of Eretz-Israel and of the Zionist Movement, are here assembled on the day of the termination of the British Mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel.
>
> We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State *in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948*, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel."

As we see, on the day the state was founded, its obligation to adopt a constitution for Israel was established. This is consistent with what was stated in Resolution 181 of the United Nations General Assembly of November 29, 1948 (hereinafter: *the General Assembly Resolution*), which served as a "basis for the international legitimacy" of establishing the State of Israel (see: *Hasson*, para. 6, *per* Justice M. Mazuz). The General Assembly Resolution established, inter alia, that each of the countries that will be established in Mandatory Palestine will hold elections for a constituent assembly that will draft a democratic constitution in the framework of which the state institutions would be established, and basic rights would be granted to all of its residents (secs. 9 and 10 of Part 1(B) of the General Assembly Resolution; and see in this regard: Joseph Weiler and Doreen Lustig, "A Good Place in the Middle – The Israeli Constitutional Revolution from a Global and Comparative Perspective," 38 IYUNEI MISHPAT 419, 455-457 (2016) [Hebrew]).

49. A few months after the establishment of the state, the Provisional Council of State – which served as the legislature (see: sec. 1 of the Proclamation of the Provisional Council of State of May, 14, 1948 and sec. 7(a) of the Law and Administration Ordinance, 5708-1948) – enacted the the Constituent Assembly Elections Ordinance, 5709-1948, and pursuant to that, the Constituent Assembly (Transition) Ordinance, 5709-1949, which established: "The Constituent Assembly shall […] have all the powers vested by law in the Provisional Council of State" (and see: HCJ 5119/23 *Anti-Corruption Movement v. Knesset* [43], paras. 11-14, *per* Justice A. Stein) (hereinafter: *Anti-Corruption Movement*)). Following the elections, which were ultimately held at the beginning of 1949, the Transition Law, 5709-1949, was enacted. It established: "The legislative body of the State of Israel shall be called the Knesset. The Constituent Assembly shall be called 'The First Knesset'" (sec. 1). Therefore, the First Knesset held both legislative power (which it inherited from the Provisional Council of State) and the power to establish a constitution (*Mizrahi Bank*, 362-364).

Over the course of several months, the First Knesset held a debate upon the need for a constitution in principle and in regard to its contents. The debate ultimately ended in a compromise known as the "Harari Decision", which was adopted by the Knesset plenum on June 13, 1950. The decision stated: "The First Knesset instructs the Constitution, Law, and Justice Committee to prepare a draft State Constitution. The constitution will be built chapter by chapter, in such a way that each will constitute a separate Basic Law. The chapters shall be presented to the Knesset when the committee completes its work, and all the chapters together shall comprise the Constitution of the State" (*Knesset Record* – June 14, 1950, 1743). Unfortunately, as a result of that decision, we find ourselves today – more than seventy-three years since its adoption – without a complete state constitution, or as Prof. Aharon Barak aptly described it in his article "The Basic Law Project – Where To?" 14 MISHPAT VE-ASAKIM 111 (2012) [Hebrew]: "The Harari Decision saved the constitutional project from destruction, at the price of directing it to a parallel track where it moves very slowly" (*ibid*., 112).

The First Knesset did not enact any Basic Laws but transferred its constituent power to the ensuing Knessets. It enacted the Second Knesset (Transition) Law, 5711-1951, in which it established: "The Second Knesset and its members shall have all the powers, rights and duties

which the First Knesset and its members had" and added that this shall also apply "to the Third and any subsequent Knesset" (see: secs. 5, 9 and 10 of the law).

50. In 1958, the Third Knesset enacted the first Basic Law – Basic Law: The Knesset, and several more Basic Laws were enacted thereafter concerning the state's institutions. The first judgments in which the Supreme Court addressed the status of the Basic Laws primarily concerned breaches of the principle of equality in elections, which was established in Basic Law: The Knesset, which also established that it could not be changed, expressly or impliedly, except by a majority of the Knesset members in each legislative stage (sec. 4 and 46 of Basic Law: The Knesset). In some of those judgments, the Court decreed that provisions that did not meet the special-majority requirement required by Basic Law: The Knesset were invalid (see: HCJ 98/69 *Bergman v. Minister of Finance* [44] (hereinafter: *Bergman*); HCJ 246/81 *Agudat Derekh Eretz v. Broadcasting Authority* [45] (hereinafter: *Agudat Derekh Eretz*); HCJ 141/82 *Rubinstein v. Chairman of the Knesset* [46] (hereinafter: HCJ 141/82)). However, in those proceedings, the Court was not required to address the question of the Knesset's authority to adopt a constitution for Israel on the merits.

51. In 1992, the first Basic Laws – and the only ones to date – that treat of individual rights were enacted: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. These Basic Laws were the first to include a "substantive" entrenchment provision (the "limitation clause"), which establishes that the rights under those Basic Laws cannot be violated "save by means of a law that corresponds to the values of the State of Israel, which serves an appropriate purpose, and to an extent that does not exceed what is required, or on the basis of a law, as aforementioned, by force of an explicit authorization therein" (sec. 8 of Basic Law: Human Dignity; sec. 4 of Basic Law: Freedom of Occupation). Thereafter, proceedings in which arguments were raised concerning the unconstitutionality of laws infringing basic rights and that did not meet the conditions of the limitations clause began to come before the Court.

52. In the *Mizrahi Bank* case, a panel of nine justices addressed matters of principle in regard to the status of the Basic Laws. In that case, contrary to the dissent of Justice M. Cheshin, the Court held that in enacting Basic Laws, the Knesset acts by virtue of its constituent power to write a constitution for Israel, and that in terms of the normative hierarchy, the status of those Basic Laws

is superior to that of "regular" primary legislation. Therefore, the Court further held in *Mizrahi Bank* that it is possible to conduct judicial review of primary legislation, and even decree it void, if it does not meet the conditions set out in the Basic Laws. This was the case, in view of the Court's jurisdiction to examine whether a "a normative provision of a lower status deviates from a higher normative provision" (*ibid*., 427).

The judgment presented two competing approaches for grounding the Knesset's power to enact Basic Laws that enjoy supra-legal normative status that would eventually become the constitution of the State of Israel. President (emer.) Shamgar relied upon "the doctrine of the unlimited sovereignty of the Knesset" according to which the Knesset is not limited in its power, except by the boundaries that it set for itself. In this regard, President (emer.) Shamgar noted:

> The Knesset operates in that capacity without any internal allocation or division into different institutions based on one body's supremacy over another. The Knesset has discretion to decide whether its legislative product will belong to the supreme constitutive level or the regular legislative level, and in enacting constitutional legislation, by virtue of its unlimited powers, it also establishes the supremacy of the constitutional law over the regular law, and is authorized to determine conditions applicable to regular legislation for the purposes of adjusting it to the norms determined in the constitutional legislation (*ibid*., 285).

The other justices concurred with this approach in the *Mizrahi Bank* case.

53. Another approach, which has taken root in the case law, was presented by President Barak and is referred to as the "constituent authority doctrine" (see, inter alia: HCJ 4908/10 *Bar-On v. Knesset* [47] 291 (hereinafter: *Bar-On*); *Hasson*, para. 17 of my opinion, and para. 4 of the opinion of Justice N. Hendel; AMNON RUBINSTEIN AND BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, vol. I: Institutions 78 (6th ed., 2005) [Hebrew] (hereinafter: RUBINSTEIN & MEDINA); Uri Aharonson, "The Constitutional Revolution: The Next Generation," 34 MECHKAREI MISHPAT 1, 4 (forthcoming) [Hebrew]). According to this approach – with which Justices D. Levin, I. Zamir and E. Mazza concurred (the other justices refrained from expressly deciding between the two approaches) – the Knesset wears two primary "hats" or "crowns": the constituent authority

hat, by virtue of which it constitutes a constitution, and the legislative authority hat, by virtue of which it enacts laws (*Mizrahi Bank*, 356).

In his opinion, President Barak emphasized that the Knesset did not create its constituent power, and that it is a power that "derives from the sovereign, i.e. the people" (*ibid*.). President Barak went on to survey a list of "constitutional data", among them – the Declaration of Independence, the Harari Decision, the adopting of twelve Basic Laws, the case law, the Knesset's reaction to the decisions of the courts, and the view of the legal community that, in his view, testify to the constituent power of the Knesset. On the basis of this data, President Barak presented three legal-theory models that, in his view, all lead to the conclusion that the Knesset is indeed granted constituent power. President Barak found all the more support for this conclusion in that the three models led to an identical conclusion:

A. The *Constitutional Continuity* model, according to which the "*grundnorm*" of the State of Israel – "its superior norm, which is not itself part of the body of positive law, but provides a basis for the other legal norms of the state" (*ibid*., 359) – is that the Provisional Council of State is the supreme legislative institution of the State. According to this model, which is based upon the approach of constitutional law scholar Hans Kelsen, the Provisional Council of State decreed in the Declaration of Independence that a constitution would be enacted by the Constituent Assembly, and that power passed by the "constitutional continuity" described above to every Knesset from then until today.
B. The *Rule of Recognition of the System* model, based upon the approach of Prof. H.L.A. Hart, according to which the rule that determines how primary norms are created in the state and their relative normative status is that "the Knesset is endowed with both constituent and legislative authority" and this reflects the "system of national life" of the State (*ibid*., 357).
C. The *Best Interpretation of Social and Legal History* model of the system in a given time, based upon the approach of Prof. Ronald Dworkin, according to which "the interpretation that best fits the entirety of Israel's social and legal history since its establishment is that the Knesset is empowered to enact a constitution for Israel" (*ibid.*, 358).

54. As we see, since the judgment in *Mizrahi Bank*, and even though the process of constituting a constitution has not been completed, the Basic Laws are viewed "in the political and public tradition as part of the constitution of the State" (*Bar-On*, 299). Accordingly, the view that the "legislative products of the Knesset in its hat as a legislative authority are subject, in terms of their normative level, to the Basic Laws that hold constitutional status" has become established (*Hasson*, para. 17 of my opinion).

55. A form test was established in *Mizrahi* in regard to the question how one can identify constitutional norms. According to this test, "the Knesset uses its constituent authority… when it gives external expression in the name of the norm, denoting it a 'Basic Law' (without specifying the year of enactment)" (*ibid*., 403). Along with this holding, the Court in *Mizrahi Bank* left two questions for further consideration. First, the question was asked what would happen in regard to "future Knesset legislation that might *'abuse' the term 'Basic Law'* by designating as such regular legislation with no constitutional content" (*ibid*., 406) (emphasis added). President Barak noted in this regard that "this question is by no means simple; its answer extends to the very root of the relationship between the constituent authority (of the Knesset) and the judicial authority (of the courts)" (*ibid*.). Second, it was noted that a need for "a determination as to whether certain provisions set forth in the Basic Law *deviate from constituent authority*" might arise (*ibid*., 394) (emphasis added). In this regard, President Barak noted that courts around the world examine the constitutionality of constitutional amendments, and that more than one such amendment has been invalidated for substantive reasons as well, but this issue was also left for further consideration in *Mizrahi Bank*.

Over the last few years, as will be explained in detail below, these questions have been raised in a number of petitions filed against Basic Laws and amendments to Basic Laws enacted by the Knesset.

B. Abuse of Constituent Power

56. As noted, *Mizrahi Bank* did not thoroughly examine the possibility that the Knesset might abuse its constituent power and recognize a norm as a Basic Law although inappropriate to be part

of a future constitution in terms of its characteristics. The need to address this possibility and to reexamine the form test for identifying Basic Laws first arose against the background of increasing use of constituent power to enact amendments to Basic Laws as temporary provisions. Thus, *Bar-On* addressed an amendment to a Basic Law that established in a *temporary provision* that the state budget for the years 2011 and 2012 would be a two-year budget. President Beinisch noted in this regard that a temporary provision inherently "contradicts the basic idea whereby the provisions of the constitution are fixed, and some would say even eternal" (*ibid*., 300). She added that "in certain circumstances, which cannot be determined in advance, it is possible that the enactment of a basic law as a temporary provision may amount to 'misuse' of the title 'Basic Law'" (*ibid*., 301). In regard to the specific amendment addressed in *Bar-On*, the Court rejected the argument that it should be voided due to abuse of constituent power, but explained that it would be better if the Knesset refrain in the future from using temporary provisions for amending constitutional provisions (*ibid.*, 307).

57. Despite the Court's comments in *Bar-On*, the Knesset continued to change Basic Laws by means of temporary provisions in order to approve two-year budgets. The fifth time that occurred, the Court granted relief for the first time on the basis of the "abuse of constituent power" doctrine, and issued a nullification notice according to which, in the future, it would not be permissible to adopt a budget that it not annual by means of a temporary provision (HCJ 8260/16 *Academic Center v. Knesset* [48] (hereinafter: *Academic Center*)). Deputy President (emer.) E. Rubinstein held that "where an abuse of the majority's power is identified in a constitutional text, the political need retreats before 'the constitutional core' and its 'sanctity', its legal importance and its importance in terms of values" (*ibid*., para. 30). Deputy President (emer.) S. Joubran added that the "abuse" doctrine is not limited to circumstances of enacting basic legislation as a temporary provision, and that "basic legislation as a temporary provision is, therefore, just one unfortunate expression of exploiting this 'constitutional gap' left by the form test" (*ibid*., para. 7 of his opinion).

58. Some four years later, judgment was handed down in *Shafir*, which addressed Amendment no. 50 to Basic Law: The Knesset that was enacted as a temporary provision and comprised, inter alia, an indirect amendment of Basic Law: The State Economy that resulted in the raising of the continuation-budget ceiling for 2020 by 11 billion shekels. In that case. The nature of the abuse of

constituent power doctrine was examined along with the source of the Court's authority to conduct judicial review thereunder:

> The center of gravity of the doctrine of abuse of constituent power is, as noted, the question whether the norm grounded in the Basic Law is, indeed, on the constitutional plane under our tests for identifying such legislation. The task of identifying a norm as a legal norm on a particular normative level, including the constitutional level, is at the core of the Court's role […] In other words, the Court's role is to defend the developing constitution against the infiltration of norms that are not of the appropriate status into the constitutional fabric in a manner that might erode and trivialize the status of the Basic Laws (*ibid*., para. 31 of my opinion).

It was explained that this doctrine is concerned with the *identification of the norm* under discussion as a constitutional norm in accordance with its the formal-procedural characteristics, as opposed to judicial review of the *content of the norm*. For that purpose, my opinion presented a two-stage test intended to guide the Court in examining whether the Knesset abused its constituent power. At the first stage, *"the identification stage*", the Court will examine whether the Basic Law or its amendment bears the formal characteristics and hallmarks of constitutional norms. To that end, several supplementary tests were established, which do not form a closed list: (1) The *stability test*, which examines the question of whether we are concerned with an arrangement that is permanent, stable and forward-looking, as is required of constitutional norms intended to establish the character of the state over time; (2) The *generality test*, which addresses whether the norm has general, abstract application that relates to a non-specific group, as opposed to a personal norm; (3) The *compatibility to the constitutional fabric test*, which examines whether the norm is consistent with the character of those subjects already arranged in the Basic Laws. If the law does not meet one or more of those characteristics, then, in the second stage – "*the justification stage*" – the burden shifts to the respondents to show a special justification for establishing an arrangement that is not of a constitutional character specifically in the framework of the Basic Laws (and compare the opinion of Justice Barak-Erez in *Shafir*, who was of the opinion that instead of the compatibility to the constitutional fabric test, we should adopt a "distinction" test that examines whether the arrangement grounded in the Basic Law clearly intrudes into an area that is

the responsibility of one of the other three branches of government, and recommended that we abandon the justification stage, such that a provision that does not meet the recognition tests cannot be deemed basic legislation).

The judgment held, by a majority of six of the nine justices on the panel, that Amendment no. 50 of Basic Law: The Knesset lacked the identifying characteristics of a constitutional norm and that the Knesset had abused its constituent power. However, it was held in that matter that it would suffice to issue a "nullification notice" stating that Basic Law: The State Economy could not be amended in a similar way in order to increase the continuation-budget ceiling. The minority (Justices Sohlberg, Mintz and Elron) dissented in regard to adopting a doctrine that deviates from the form test for identifying Basic Laws based upon their title.

59. The abuse of constituent power doctrine – first presented in *Bar-On*, recognized and first applied in *Academic Center*, and developed into concrete tests in *Shafir* – has taken root in the case law, and additional constitutional amendments have been examined in accordance with it over the last years (see: HCJ 2905/20 *Movement for Quality Government v. Knesset* [49] (hereinafter: the *Rotation Government* case); and *Scheinfeld*). This was, inter alia, in view of a pattern of significant regime changes "executed *ad hoc*, sometimes by means of temporary provision, for immediate implementation (sometimes exclusively) by the Knesset that executed them" (the *Rotation Government* case, para. 11 of my opinion; and see *Scheinfed*, para. 42 of my opinion, and para. 4 of the opinion of Justice O. Groskopf). There is, therefore, no substance to the claim by the Government Respondents that the abuse of constituent power doctrine "was never accepted as binding precedent by the Court" (para. 148 of the Government Respondent's Affidavit in Response). As detailed above, this doctrine was addressed more than once before expanded panels of this Court and was repeatedly adopted by a majority of the Court. In two of those proceedings, the petitions were even *granted* by reason of the Knesset's abuse of constituent power, although the constitutional remedy granted was forward looking.

We can summarize in saying that in the framework of the abuse of constituent power doctrine, the Court focuses on identifying the norm under review and upon the question of whether it is appropriate, in terms of its characteristics, to be found at the constitutional level (the *Rotation Government* case, para. 2 of my opinion). It does not conduct judicial review of the content of

basic legislation in the framework of this doctrine (see: *Academic Center*, para. 5, *per* Deputy President (emer.) Joubran).

C. Deviation from the Knesset's Power as a Constituent Authority

60. A separate question is that of whether there can be situations in which there is no flaw in titling a norm as a "Basic Law", but the substantive *content* of the norm leads to the conclusion that it constitutes a "deviation from constituent authority" of the Knesset (*Mizrahi Bank*, 394). This issue is examined in comparative law by means of the "unconstitutional constitutional amendment" doctrine, which is accepted in various legal systems. In accordance with this doctrine, there are substantive limits upon the power to amend the constitution, and the courts void constitutional amendments that deviate from those limits (for a detailed discussion of this subject, see: YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017) (hereinafter: ROZNAI).

61. Research conducted on the subject found that some 40% of the constitutions in the world comprise *explicit* restrictions upon amending the constitution. These restrictions are grounded in "eternity clauses" established in the constitution itself, and they prohibit changing or amending certain parts of it (Yaniv Roznai, "Misuse of Basic Laws", in JUDGE ELYAKIM RUBINSTEIN BOOK, vol. II 1349, 1353 (Aharon Barak et al. eds.) (2021) [Hebrew]). Eternity clauses reflect the decision of the constituent body that certain provisions of the constitution are basic conditions of the state's identity and existence, and it must, therefore, be ensured that "they will survive for generations without reliance upon the one majority or another" (*Hasson*, para. 13 of my opinion). In some of those constitutions, the eternity clause is accompanied by an express provision empowering the court to examine the constitutionality of constitutional amendments in accordance with those clauses (see: Aharon Barak, "An Unconstitutional Constitutional Amendment," in GAVRIEL BACH BOOK 361, 373 (David Hahn et al. eds. 2011) (hereinafter: Barak, "Constitutional Amendment")). Similarly, there are countries in which even in the absence of such and explicit provision, the court is viewed as the body authorized to examine whether the eternity clause has been breached (see: ROZNAI, 203). The most salient example in this regard is Germany. The German Basic Law establishes that the provisions regarding, inter alia, human dignity, the federal division of the states,

and Germany's being a social democracy (sec. 79(3) of the *Grundgesetz*). Over the years, the German Constitutional Court has viewed itself as holding jurisdiction to decide whether a constitutional amendment breaches the restrictions established in the constitution in this regard even though there are no express grounds for this jurisdiction in the text of the constitution (see, e.g.: 30 BVERGE 1 (1970); 109 BVERGE 279 (2004). A similar example can be found in Brazil, on which see: Conrado Hübner Mendes, "Judicial Review of Constitutional Amendments in the Brazilian Supreme Court," 17 FL. J. INT'L. L. 449 (2005)).

Another model of the unconstitutional constitutional amendment doctrine relies upon the existence of *implied* limitations upon amending the constitution. Thus, in India we find the "basic structure" doctrine, according to which the power to amend the constitution does not include the power to entirely rewrite its identity or basic character (see: ROZNAI, 42-47). The Indian Supreme Court held that it holds the authority to conduct substantive judicial review of constitutional amendments by virtue of this doctrine, and over the years it has voided a number of constitutional amendments (see, inter alia: *Minerva Mills v. Union of India* [161]; *Supreme Court Advocates-on-Record Ass'n v. Union of India* [162]; on other countries that have implied restrictions upon the constitution, see: ROZNAI, 47-69).

62. In any case, the above models apply in countries that have complete constitutions constituted upon the "original" constituent power, and the express or implied limitations are applied thereby upon the "derivative" power to amend the constitution (in regard to the distinction between "original" or "primary" constituent authority and "derivative" or "secondary" constituent power, see: Claude Klein, "The Constituent Power before the Supreme Court: After the *Bank Hamizrahi* Case", 28 MISHPATIM 341, 355-356 (1997) [Hebrew]; AHARON BARAK, BASIC LAW: HUMAN DIGNITY AND LIBERTY AND BASIC LAW: FREEDOM OF OCCUPATION, vol, I – The Theory of Constitutional Rights (I. Zamir, ed., 2023) (hereinafter: BARAK: THEORY OF CONSTITUTIONAL RIGHTS)). These models cannot be applied as such in Israel, where the task of drafting a constitution has not yet been completed and is still being created "chapter by chapter". That being the case, the use of the term "constitutional amendment" raises problems in our system (see: Barak, "Constitutional Amendment", 379). Indeed, although this Court has referred to the existence of basic principles at the foundation of the state's identity on several occasions (see, e.g.: CA 733/95 733/95 *Arpal Aluminum v. Klil Industries* [50] 629-630 (hereinafter: *Arpal*); HCJ 6427/02

Movement for Quality Government v. Knesset [51] 717 (hereinafter: *The Tal Law* case)), the question of the applicability of the "unconstitutional constitutional amendment" doctrine in Israel was left for further consideration, while emphasizing the difficulty in adopting models from comparative law into our system in this context (see: *Bar-On*, 309-311; *Academic Center*, para. 35, *per* Deputy President (emer.) E. Rubinstein, and para. 15, *per* Justice U. Vogelman; HCJ 5744/16 *Ben Meir v. Knesset* [52] para. 25 of my opinion (hereinafter: *Ben Meir*)).

63. The most significant discussion on the limits of the constituent authority appears in *Hasson*, which addressed the constitutionality of Basic Law: Israel – The Nation State of the Jewish People (hereinafter: *Basic Law: The Nation*). In that matter, it was noted that the question of adopting a comprehensive doctrine for examining the constitutionality of amendments to the constitution would best be addressed when the completed Basic Law project has become a full constitution. However, it was emphasized that "the significance of that is *not* necessarily that in the absence of a comprehensive doctrine, the constituent power of the Israeli constituent authority is unlimited" (*ibid*., para. 15 of my opinion) (emphasis original). In this regard, we explained that two separate questions needed to be addressed: "The first question is whether there already are any *substantive* (content-based) *limitations* on the Knesset's constituent power; the second – if there are such limitations, do they grant this Court the authority to conduct *substantive judicial review* of Basic Laws […]" (*ibid*., para. 16 of my opinion) (emphasis original). The first question was answered with a ringing, clear "yes" in *Hasson*. Answering the second question was not required for deciding *Hasson*, and it now stands before us.

C. 1. The Limits upon the Power of the Constituent Authority

64. The judgment in Hasson first established in no uncertain terms that the power of the Knesset wearing its constituent authority hat is not unlimited and it is not authorized to deny – in law or in practice – the core identifying characteristics of Israel as a Jewish and democratic state. In this regard, it was noted that "our constitutional edifice is not complete, and it is certainly possible that floors and extensions may be added to it along the way, but its support columns – the Jewish column and the democratic column – have already been set in place. Negating either of them leads to the collapse of the entire structure" (*ibid.*, para. 18 of my opinion). Nine of the eleven

justices on the panel concurred with this conclusion (Justices Sohlberg and Mintz refrained from directly addressing this issue and focused upon the problems related to judicial review of the Basic Laws).

65. The conclusion in regard to the existence of restrictions upon the power of the Knesset to adopt a constitution can be learned from the constitutional text and the constitutional system as a whole, as developed since the earliest days of the state. The Declaration of Independence, which charged the "Elected Constituent Assembly" with the task of adopting the constitution, defined Israel as a Jewish state and gave clear expression to its democratic character as a state committed to equal rights and the freedoms of the individual. While the attorney for the Government Respondents repeatedly emphasized, in writing and orally, that the Declaration itself does not have binding legal status, it would seem that no one disputes that, in practice, this Declaration grounds "the foundational concepts of the State until this day" (EA 1/88 *Neiman v. Chairman of the Central Elections Committee* [53], 188 (hereinafter: *Neiman*)). This is the "birth certificate" of the state and it expresses the national vision (*Kol Ha'am*, 884; *Mizrahi*, 309): Israel is a *Jewish* state. Israel is a *democratic* state.

The Basic Laws also reflect the fact that Israel is a Jewish and democratic state, and this is its "identity card" (*Hasson*, para. 19 of my opinion). Thus, sec. 1A of Basic Law: Human Dignity and Liberty and sec. 2 of Basic Law: Freedom of Occupation refer to "the values of the State of Israel as a Jewish and democratic state"; and sec. 7A(a)(1) of Basic Law: The Knesset makes it possible to deny the right to be elected to the Knesset to a person who negates "the existence of the State of Israel as a Jewish and democratic state". Similarly, there are "regular" laws that expressly include the term "Jewish and democratic state", along with many other laws that establish the identity of the state as such by their substance, among them the Law of Return, 5710-1950 (hereinafter: *the Law of Return*) and laws concerning the prohibition of discrimination (for a detailed list, see *Hasson*, para. 22 of my opinion). The case law has also noted over the years that the Jewish character of the state is "its clear hallmark among the nations and the states" and that its democratic character is its "life breath" (EA 11280/02 *Central Elections Committee v. Tibi* [54], 101 (hereinafter: *Tibi*); *Neiman*, 188; and also see: HCJ 466/07 *Gal-On v. Attorney General* [55] 63).

From the above we can conclude:

> The Declaration of Independence defined the character of the state as Jewish and democratic; the Basic Laws expressly grounded these elements in the identity of the state; the legislation and case law strengthened and fortified them; and the history of the nation has repeatedly demonstrated that this is its character since its inception. Therefore, it would appear that even though the constitutional project has not yet been completed, the identity of the State of Israel as a Jewish and democratic state cannot be disputed (*Hasson*, para. 23 of my opinion; and also see: *ibid*., para. 2, *per* Deputy President H, Melcer).

66. The conclusion in regard to the boundaries of the constituent power directly derives from those "constitutional data" that ground the very existence of the constituent power. In other words, the basis for the conclusion as to the boundaries of the constituent power granted to the Knesset is, in my opinion, the existing constitutional system in its entirety – i.e., those "constitutional data" upon which the upon which the theory of the constituent power was formed from the outset. This, as opposed to other approaches that deduce the existence of limitations upon the constituent power from "framework rules" established in the Declaration of Independence (BARAK: THEORY OF CONSTITUTIONAL RIGHTS, 282-283; and see: Ariel Bendor, "The Legal Status of the Basic Laws," in BERENSON BOOK, vol. II (A. Barak and H. Berenson, eds., 2000) [Hebrew] (hereinafter: Bendor, "Legal Status")) or from unwritten supra-constitutional principles (see the approach of Justice Cheshin in *Arpal*, 629 and in *The Tal Law*, 761). Justice Hendel defined this well in noting that the most appropriate interpretation of the entire constitutional history of the State of Israel since its inception is that the Knesset's power to adopt a constitution is subject to preserving the "kernel of its Jewish-democratic identity", and that the constitutional data shows the existence of "recognition rules" that limit the Knesset's power to abolish the kernel of the Jewish and democratic character of the State of Israel by means of first-order rules (*Hasson*, para. 4 of his opinion).

67. *Hasson* held that the Knesset's constituent power comes from the sovereign (the people) and passed from Knesset to Knesset to this day. Therefore, the possibility of establishing a

constitutional provision that would tumble the building blocks of the state as Jewish and democratic "is not within the constituent power of the Knesset" (*ibid*., para. 24 of my opinion; and see: *The Tal Law*, 717). It was further held in *Hasson* that the limitations upon the constituent power apply both to the adoption of a new Basic Law and to the enactment of an amendment to an existing Basic Law. However, given the present stage of the Israeli constitutional project, these limitations are extremely narrow and concern "situations in which a Basic Law facially negates or contradicts 'the "nuclear" characteristics that form the minimum definition' of Israel as a Jewish and democratic state" (*ibid*., paras, 27 and 29 of my opinion; and also see: *ibid*., para. 4 of the opinion of Justice (emer.) Mazuz).

C.2. The Role of the Court

68. Given the substantive limitations upon the Knesset in exercising its constituent power, the main question that remains to be decided is whether this Court should be granted the possibility of conducting judicial review in order to ensure that those limitations are indeed observed, and in order to intervene in those exceptional, rare instances in which the Knesset has deviated from them.

As noted, this question was left undecided in *Hasson*, where the majority was of the opinion that Basic Law: The Nation does not negate the core characteristics of the State of Israel as a democratic state, and therefore, there was no need to determine the question of the Court's jurisdiction to conduct substantive judicial review of Basic Laws.

69. As noted in *Hasson*, establishing that the Knesset, as a constituent authority, is not "all powerful" and that it is subject to certain limitations does not, itself, *necessarily* lead to the conclusion that a deviation by the Knesset from its power in this regard will constitute grounds for judicial review (*ibid*., para. 32 of my opinion). Thus, for example, art. 89 of the French Constitution comprises an eternity clause according to which: "The republican form of government shall not be the object of any amendment". However, the French Conseil Constitutionnel ruled that it does not have jurisdiction to conduct judicial review of constitutional amendments (CC decision No. 2003-469 DC, Mar. 26, 2003, Rec. 293). In such countries, the limitations upon amending the constitution are non-enforceable. Their influence is only in internalizing the rules of the

constitutional game by the elements involved in establishing the constitutional norms, and if such rules be breached – the public can make its voice heard on election day (*Hasson*, para. 33 of my opinion; see in this regard: EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), Report of Constitutional Amendment 44 (2010)). As opposed to that, as noted above, in no insignificant number of states, the constitutional courts have established their authority to review constitutional amendments and void them if the amendment violates the express limitations in the constitution (e.g., Germany) or implied constitutional limitations (e.g., India), even without that power being expressly set out in the constitutional text. In those systems, the court's role is to ensure that the limitations upon amending the constitution will not remain purely declarative, and in cases in which the boundaries of the amending power are "breached", it will be possible to protect that unchangeable constitutional core in practice.

70. In Israel, the Basic Laws do not expressly refer to the question of jurisdiction to conduct substantive judicial review of the Basic Laws. Likewise, the constitution-in-formation does not comprise an eternity clause or a complete "basic structure" that can be pointed to at present, which makes it difficult to adopt a *comprehensive* unconstitutional constitutional amendment doctrine. However, even at this stage of the constitutional project, we can state that "'Jewish and democratic' are the Jachin and Boaz [I Kings 7:21 – trans.], the central pillars of the State of Israel" (*Hasson*, para. 1, *per* Justice I. Amit), and that suffices to establish a limitation – albeit narrow – upon the constituent power of the Knesset. Against this background, Justice Vogelman noted in *Hasson* that he tended to the approach that the authority to conduct judicial review "derives from the substantive limitations upon the power of the constituent authority. This, in order that those limitations not be rendered a dead letter" (*ibid.*, para. 4 of his opinion; see and compare: *ibid*., para 4, *per* Justice Hendel; Academic Center, para. 35, *per* Deputy President (emer.) Rubinstein).

71. I will begin hysteron proteron by saying that I am also of the opinion that in those rare cases in which the Knesset deviated from the boundaries of its constituent power, the Supreme Court sitting as High Court of Justice possesses the authority – and is even required – to declare that we are not concerned with a valid constitutional norm. As I will explain below, this conclusion derives directly from the unique characteristics of our constitutional structure and from the manner of exercising constituent power, which distinguishes our system from other legal systems and leads

to the conclusion that the limitations upon the Knesset's constituent power cannot be left unenforceable.

The Uniqueness of the Constitution-in-Formation "Israel style"

72. The uniqueness of the Israeli constitutional project is expressed in three primary aspects: (1) the fact that it is built in stages, "chapter by chapter" over the course of decades; (2) the absence of a special procedure for adopting constitutional norms; (3) the exceptional control of the political majority – the Government, in particular – over the exercise of constituent power.

Below, I will briefly address each of these aspects.

(1) "Chapter by Chapter"

73. As opposed to the constitutions of other countries that were adopted upon the establishment of the state or pursuant to a revolution, war or other extreme change in national life, in Israel, upon the adoption of the Harari Decision and the dissolution of the constituent assembly (the First Knesset) without the adoption of a constitution, "the opportunity for adopting a constitution at the 'revolutionary moment' of the establishment of the state was lost" (RUBINSTEIN & MEDINA, 76). The "Israel-style" constitution was, therefore, not completed in a single process and it is still being crafted "chapter by chapter" (*Bar-On*, 297-299; *Academic Center*, para 15, *per* Justice Vogelman). As a result, elements generally present in constitutions throughout the world have not yet been established in the Basic Laws, including some of the basic rights and the manner of amending the constitutional text (Basic Law: Legislation) (*Bar-On*, 297; Rivka Weill, "Shouldn't We Seek the People's Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel's Constitution," 10 MISHPAT UMIMSHAL 449, 450 (2007) [Hebrew]). In addition, we are concerned with a process spread out over a long period, which has no counterpart in the constitutional history of other states, and that has no discernable end point (*Mizrahi*, 402). As a result, Israel finds itself in the unusual situation in which there is no single constituent assembly, and in practice, there have, at present, been 25 constituent assemblies whose members have changed every few years (or months) in accordance with the results of the Knesset elections. From a comparative

perspective, as noted in the literature, "there is no example to be found of such a strange constituent assembly – all the known examples are of constituent assemblies elected specifically for that purpose, that addressed the adoption of a constitution over the course of a few months or years, and that then dispersed" (Iddo Porat, "Constitutional Politics and Regular Politics – The Nation Law, The Constituent Power Doctrine, and Constitutional Dualism," 20 DEMOCRATIC CULTURE 217, 246 (2021) [Hebrew] (hereinafter: Porat, "Constitutional Politics")).

74. Indeed, the fact that the Israeli constitution has not yet been completed justifies refraining from adopting a *comprehensive* doctrine of unconstitutional constitutional amendment. However, prolonging the completion of the constitutional project and its continuation over the course of decades increase the fear of the possible weakening of the founding narrative that defines our existence and that stood at the basis of the establishment of the state, and perhaps, Heaven forbid, even disengagement from it. Moreover, the view that there is no possibility for judicial review of the content of Basic Laws until the completion of the constitution serves as a negative incentive for the Knesset to continue to delay the adoption of a constitution (*Hasson*, para. 2, *per* Justice. A. Baron). The words of Justice G. Karra, in his dissent in *Hasson*, are apt in this regard:

> If the argument of waiting for the completion of the constitutional project is accepted, then, under the aegis of the absence of arrangements for conducting judicial review, and despite the fact that the "project of adopting a constitution" has not yet ended even after over 70 years since the establishment of the state – the constituent authority will be found "immunizing" itself, *de facto*, from judicial review. Thus, on the face of it, it has the unbridled, unlimited ability to establish Basic Laws however it may see fit, including Basic Laws that materially violate fundamental democratic values. Such a "normative vacuum" cannot be tolerated (*ibid.*, para. 9 of his opinion).

(2) The Absence of a Special Procedure for adopting Constitutional Norms

75. Another characteristic that sets the Israeli constitutional project apart in comparison to other constitutions around the world is the fact that there is no real difference between the procedure for adopting a Basic Law and the procedure for enacting "regular" laws. The procedure for enacting Basic Laws is set out in the Knesset Rules of Procedure, and new Basic Laws can be adopted by a simple majority of those present in the chamber (see: *Bar-On*, 298). The same is true for amending an existing Basic Law. This is the case except in regard to entrenched Basic Laws, like Basic Law: The Knesset, which can only be amended by a majority of 61 members of Knesset in each reading. But in the normal course of events, that is the majority enjoyed by every coalition. In addition, there are *a few* provisions that can only be amended by a majority of 80 members of Knesset (secs. 9A(a), 44, and 45 of Basic Law: The Knesset, treating of postponing elections and suspension by means of emergency regulations; and secs. 6-7 of Basic Law: Jerusalem the Capital of Israel in regard to transferring part of the city to a foreign entity).

Against this background, "the unbearable lightness of enacting and amending Basic Laws" has been emphasized on more than one occasion (Ariel Bendor, "Defects in the Enactment of Basic Laws," 2 MISHPAT UMIMSHAL 443, 444 (1994) [Hebrew]; and see: *Mizrahi Bank*, 302; *Hasson*, para. 5, *per* Justice (emer.) Mazuz). This Court has repeatedly called for the adoption of Basic Law: Legislation, which would establish a special, fixed legislative procedure that would distinguish adopting Basic Laws and their amendment from the process of enacting "regular" laws. Unfortunately, the adoption of this Basic Law remains in abeyance (*Hasson*, para. 91 of my opinion; and also see: Bar-On, 313; Shafir, para 3, *per* Justice Amit).

76. The simple procedure by which constitutional norms can be adopted in Israel is markedly exceptional in relation to other states. A comparative survey recently conducted at the request of the legal advisor to the Constitution Committee examined the arrangements for amending constitutions in 22 western democracies (Gabriel Bukobza, "Arrangements for Amending Constitutions" (Knesset Research and Information Center, 2023)). All of the countries surveyed have a special, rigorous procedure for amending the constitution, which comprises at least one (and usually more) of the following mechanisms: ratification by two houses of the parliament; ratification of the amendment by a special majority (e.g., three-fifths or two-thirds); ratification of the amendment both by the federal legislature and by the states of the federation; ratification of the amendment only after elections for the parliament; ratification of the amendment by plebiscite.

It would not be superfluous to note that the procedure for adopting a new constitution is generally "more burdensome than regular legislative process and separate from it" (Porat, "Constitutional Politics," 227). Thus, "in many countries, there are different procedures for amending the constitution, but there is no country that has a model similar to that of Israel, in which a constitutional amendment – i.e., the enactment of a new Basic Law or the amendment of an existing Basic Law – can be enacted by the regular legislative process, by a majority, in a single legislative house" (AMIR FUCHS & MORDECHAI KREMNITZER, DISTRIBUTION OF POWER, NOT SEPARATION OF BRANCHES: PREVENTING THE CONCENTRATION OF POLITICAL POWER IN ISRAEL, 65 (Policy Paper 133, Israeli Democracy Institute, 2019) [Hebrew] (hereinafter: DISTRIBUTION OF POWER)).

77. In this regard, we should emphasize that there are significant reasons for maintaining a distinction between the enactment of regular laws – which, by there nature, are designed in accordance with the rules of "day-to-day politics" and expressed in a decision of a simple majority – and "constitutional politics" by which constitutional norms are adopted in a lengthy, deliberative, consensual process (Porat, "Constitutional Politics," 218; Yoav Dotan, "A Constitution for Israel? The Constitutional Dialogue after the Constitutional Revolution," 28 MISHPATIM 149, 162 (1996) [Hebrew]; William Partlett & Zim Nwokora, "The Foundations of Democratic Dualism: Why Constitutional Politics and Ordinary Politics are Different," 26 CONSTELLATIONS 177 (2019). Special, rigorous procedures for adopting and amending a constitution help prevent "constitutional grabs" by a "narrow" majority, ensure the stability of the most substantial arrangements of the political and legal system, require balancing and compromises among different sectors of the state, and grant the constitutional text broad legitimacy (*Hasson*, para. 2, *per* Justice Karra; Porat, "Constitutional Politics," 230-236).

78. Inherently, the more rigorous and burdensome the process required for amending the constitution, the weaker the justification for substantive judicial review of constitutional norms. This is so because meeting the complex requirements for amending the constitution is itself "a guarantee of a significant debate upon the content of the amendment and its appropriateness to the system" (*Hasson*, para. 12, *per* Justice Barak-Erez). For example, in the United States – where the Supreme Court refrains from conducting judicial review of constitutional amendments (see: *Coleman v. Miller*, 307 U.S. 433 (1939)) – a proposal to amend the Constitution will be adopted

subject to its approval by two-thirds of each of the houses of Congress and ratification by three-quarters of the states. These are very rigorous demands, and it comes as no surprise that the last amendment to the Constitution (the 27th Amendment) was ratified over 30 years ago.

As opposed to this, the Israeli system is a clear edge case in which the simple procedure for adopting constitutional norms grants a chance majority the possibility of fundamentally changing the state's constitutional structure and the national identity quickly and easily (see and compare: *Bar-On*, 313; *Academic Center*, para. 102, *per* Deputy President Melcer, who was in the minority in regard to the result). Therefore, in Israel, there is justification for conducting substantive judicial review of Basic Laws in the absence of any of the other guarantees provided by a rigorous process like those found in other countries for adopting constitutional norms.

(3) Control of the Exercise of Constituent Power by the Political Majority

79. As noted, our constitutional history has led to a situation in which the same body – the Israeli Knesset – exclusively holds both the legislative and the constituent powers. In other words, the same members of Knesset who are elected in parliamentary elections in accordance with their party affiliation are entrusted with enacting both "regular" laws and Basic Laws. Alongside that, the Israeli regime structure grants the government significant influence over legislation by means of such mechanisms as party discipline and the Ministerial Committee for Legislation (Matan Gutman, "The Coalition State: 'Rubber Stamp" or "Cheerleading Squad'," SALIM JOUBRAN BOOK 197 (Aharon Barak et al., eds, 2023) [Hebrew] (hereinafter: Gutman)). One might have expected that these mechanisms would be reserved for proceedings concerning the Knesset's role as a legislative authority, as MK Yizhar Harari (for whom the Harari Decision was named) well expressed in his comments to the Knesset plenum in the debate on Basic Law: The President:

> […] in the matter of the constitution and the chapters of the constitution, there is a complete blurring between the present interests of the factions in supporting or opposing the government, and it would be well if, in general, the members of the Knesset would vote with complete freedom, because the constitution that we are adopting is not for this Knesset or this government,

> but rather for a period that I hope will be at least like that of the Constitution of the United States (Knesset Record, June 9, 1963, 2031).

However, the reality is that this hope expressed by MK Harari was not realized. In practice, coalition discipline became an integral, inseparable part of our parliamentary system, which is also expressed in the proceedings for adopting Basic Laws (Amnon Rubinstein and Yuval Geva, "The use of Political Discipline in adopting Basic Laws" (ICON-S-IL Blog (March 25, 2020) [Hebrew] (hereinafter: Rubinstein & Geva)). The combination of the institutional identity of the Knesset as a legislature and as a constituent authority and the Government's dominance in the legislative process lead to the Government holding "power (that it uses frequently) to create constitutional amendments and thereby change the Basic Laws, and with them, the rules of the game" (DISTRIBUTION OF POWER, 66). Expressions of the political majority's effective control over the adoption of Basic Laws can be found, inter alia, in the establishing of special "ad hoc" committees to consider proposals for Basic Laws instead of the permanent committees (see, for example, the joint committee established for the purpose of enacting Basic Law: The Nation; *Hasson*, para. 2 of my opinion), and in the signing of coalition agreements and specific undertakings to support initiatives for the adoption of Basic Laws, while denying Knesset members the possibility of forming an independent opinion on the matter (see: Ittai Bar-Siman-Tov, "The Law of Lawmaking," 37 IYUNEI MISHPAT 645, 696 (20160 [Hebrew] (hereinafter: "Law of Lawmaking")).

80. Israel's institutional structure thus increases the fear that long-term planning may be tainted by short-term political interests in a manner that may lead to very serious harm to the constitutional order (the *Rotation Government* case, para. 103, *per* Deputy President (emer.) Melcer). Thus, the political majority's extraordinary control of the legislative process also adds to the need for judicial review of the content of Basic Laws (see and compare: *Hasson*, para. 2, *per* Justice Baron; ROZNAI, 219).

81. The three structural aspects described above – adopting a constitution "chapter by chapter", the absence of a special procedure for adopting constitutional norms, and the control of the exercise of constituent power by the political majority – and all the more so when taken cumulatively, make our constitutional system unusual by any standard. In this situation, leaving the limitations upon the Knesset's power unenforceable and not subject to any possibility for the court to examine

whether the Knesset exceeded its autority – even in extreme cases – presents a very serious problem. Justice (emer.) Mazuz emphasized this in *Hasson*, noting:

> […] the absence of a complete constitution, and the existence of an anomalous situation in which Israeli constitutional norms are, in practice, enacted by the regular legislative process, in the absence of institutional and procedural separation between legislating constitutional provisions and regular laws, and not in a rigorous, unique procedure for enacting a constitution or constitutional amendments as is usual in regard to constitutions throughout the world, gives rise to the need and importance of there being limitations upon the exercise of the constituent power and in conducting judicial review specifically at this stage (*ibid*., para 5 of his opinion).

The Exercise of Constituent Power in Practice

82. The problematic practice that has developed over the last few years for the adoption of Basic Laws also reinforces the need for substantive judicial review of Basic Laws.

First, over the years we see a change in the conception of the role of the members of the Knesset in adopting chapters in our developing constitution. Thus, the process for adopting the first Basic Law – Basic Law: The Knesset – took a number of years, and the Basic Law was ultimately approved by a majority of 96 with none opposed. The Basic Laws addressing human rights – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation – were, indeed, approved by a smaller majority and without opposition, but their adoption was preceded by a process that took several years. It began with the preparation of a government bill prepared by the Ministry of Justice and addressed in many meetings of the Government, and concluded with private member's bills based upon that Government bill, which were supported by Knesset members of the coalition and the opposition factions as one (for a detailed discussion, see: Amnon Rubinstein, "The Knesset and the Basic Laws on Human Rights," 5 MISHPAT UMIMSHAL 399 (2000) [Hebrew]; Uriel Lynn and Shlomi Loya, HOW THE ISRAELI POLITICAL SYSTEM WAS

CHANGED: 1990-2020, 57-82 (2022) [Hebrew] (hereinafter: LYNN & LOYA)). The then chair of the Constitution Committee, MK Uriel Lynn of the Likud faction, emphasized at the time of the approval of Basic Law: Human Dignity and Liberty in the second and third reading that: "This law was prepared with the understanding that we must create broad consensus of all the factions of the house. We were aware that we cannot adopt a Basic Law that anchors the values of the State of Israel as a Jewish and democratic state if we do not achieve a broad consensus of all the factions of the house" (Knesset Record, March 17, 1992, 3782). Two years later, a new version of Basic Law: Freedom of Occupation was approved along with an indirect amendment of Basic Law: Human Dignity and Liberty by a large majority of the Knesset (for a detailed discussion, see: LYNN & LOYA, 82-83); AMICHAI COHEN, THE CONSTITUTIONAL REVOLUTION AND COUNTER-REVOLUTION 102-103 (2020) [Hebrew]). As opposed to that, the new Basic Laws approved over the last decade were adopted on the basis of the votes of the members of the coalition factions alone, while imposing the mechanism of coalition discipline (see: CONSTITUTIONAL LAW, 696; Porat, "Constitutional Politics," 252-253; Rubinstein & Geva). This would seem to accurately reflect the different times and the fact that over the last years, the task of adopting a constitution is no longer conceived as a joint national project but rather as an additional source of power in the hands of the chance political majority in the Knesset.

83. Second, recent research has noted that since the adoption of the first Basic Law (Basic Law: The Knesset in 1958) and until January 2023, 139 changes have been made in the Basic Laws (see: Elad Gil, "Changing the Rules of the Game during the Game – An Israeli 'Pathology'," (Tachlit –Institute for Israeli Public Policy (Jan. 18, 2023) [Hebrew]). According to that research, that is the highest rate of constitutional change in the world by a large margin. For the sake of comparison, the Constitution of the United States has been amended 27 times, of them only 8 constitutional amendments in the last hundred years. If that were not enough, in the last eight years, the number of changes to the Israeli Basic Laws (an average of 4.75 changes per year) doubled in comparison to the number of changes (an average of 2.15 changes per year) over the decades since 1958. The research further found that 62% of the changes made to Basic Laws concerned Basic Law: The Knesset and Basic Law: The Government – in other words, the overwhelming majority of the rules that were changed directly concerned the authority of the members of the Knesset and the Government themselves, and over the last few years, a significant part of those regime changes

were adopted immediately after the Knesset elections and prior to the formation of the Government (see, inter alia, the amendments addressed in the *Rotation Government* case and in *Scheinfeld*). In fact, as the above research also shows, over the last few years, the process of forming a Government is systematically accompanied by changes in the rules of the game in favor of the incoming Government. In this regard, I only recently noted in *Scheinfeld* that "it is hard not to see Amendment no. 11 to the Basic Law as a high point, or more accurately, a low point of that worrisome phenomenon that I noted in the *Rotation Government* case, in which members of the Knesset exploit the ease by which it is possible to amend the Basic Laws for specific political needs" (*ibid*., para. 43 of my opinion).

Until now, this phenomenon of trivializing the Basic Laws was mentioned primarily in the context of the unconstitutional constitutional amendment doctrine, which examines, inter alia, whether a constitutional norm is actually a personal norm intended to serve a specific government or Knesset. Nevertheless, this phenomenon also illustrates the danger posed by leaving the limitations upon the constituent power as limitations "on paper" alone. Indeed, in view of the gaps that make it possible to change constitutional norms with such great ease, and the increasing willingness of the political majority to exploit those gaps, there would appear to be a problem in relying upon the self-restraint of the Knesset as the only check upon violating the core characteristics of the State of Israel as Jewish and democratic (see and compare: ROZNAI, 182).

84. The Knesset noted in its Affidavit in Response that "[…] if, Heaven forbid, the Knesset were to adopt Basic Laws that would strike a mortal blow to the pride and joy of Israel's democracy, it can be expected that the sovereign – the people – would lawfully protest and replace its members on election day" (para. 353 of the Affidavit in Response). In view of the core principles in the balance – the Jewish character and the democratic foundations of the state – I believe that this argument understates the severity of the danger presented by situations in which the Knesset deviates from its constituent power. I do not believe that waiting for "election day" (normally, every four years) provides a sufficient response to a situation in which a political majority decides to exploit the (easily exploited) opportunity to fundamentally change the existing constitutional system. This is particularly so because the rules for conducting the elections themselves can also be changed easily (with the exception of the entrenched provision regarding the date for holding elections).

85. Under these circumstances, there is a need for an apolitical institution that can serve as an "external brake" upon such extreme situations in which the Knesset might breach the boundaries of its constituent power. Therefore, as will be explained below, there would seem to be no alternative to recognizing the possibility of conducting judicial review by this Court, sitting as High Court of Justice, in order to ensure an effective response in such edge cases.

The Court as the Proper Institution for Overseeing the Boundaries of the Power of Constituent Authority

86. In my opinion, the conclusion that this Court is the appropriate body for guarding against a breach of the boundaries of the Knesset's constituent power derives from the nature of its function.

The Court is entrusted with protecting the fundamental concepts and values of Israeli society, and it serves as "the principal tool for ensuring the existence and respect of the constitution" (*Mizrahi Bank*, 317; and see: Eliahu Mazza, "Judicial Responsibility," in ELIAHU MAZZA BOOK 995, 997 (Aharon Barak et al., eds., 2015) [Hebrew]). I addressed the role of the Court in *Hasson*:

> One of the primary functions of the Court is "protecting the Basic Laws that are at the core of our legal system" […] Therefore, it can be argued that alongside the Court's judicial review of primary legislation and administrative actions in order to ensure that they not lead to severe harm to values and principles grounded in the Basic Laws, it must make sure that the Basic Laws themselves not comprise provisions that might strike a mortal blow to the core of the entire constitutional system, while denying Israel's character as a Jewish and democratic state […] (*Hasson*, para. 34 of my opinion; and see: *ibid*., para. 8, *per* Deputy President (emer.) Melcer).

The Court's role in protecting the constitutional project is of particular importance in view of the unique character of Israel's constitutional-institutional system, which I addressed above (and

see: *Shafir*, para. 32 of my opinion). In fulfilling that role, the Court is currently required to prevent unjustified harm to the Basic Laws caused by regular legislation and administrative decisions, to enforce procedural requirements and "rigid" provisions, and to identify provisions in Basic Laws that, in terms of their character, do not belong at the constitutional level and whose penetration into the constitution-in-the making would lead to the erosion and trivialization of the status of Basic Laws. Conducting judicial review in those rare cases in which the Knesset deviates from its constituent power and from the (narrow) limits upon it in adopting Basic Laws is, in my opinion, entirely consistent with the Court's role as the defender of the constitutional project.

87. We should further bear in mind that one of the primary roles of this Court is to ensure that all governmental agencies act *within the bounds of their authority*. To that end, the Court is granted, inter alia, the broad authority to grant relief "for the sake of justice" and to issue orders to all state authorities under secs. 15(c) and 15(d)(2) of Basic Law: The Judiciary (see: HCJ 971/99 *Movement for Quality Government v. House Committee* [56] 140, 164-165 (hereinafter: HCJ 971/99); and see: YOAV DOTAN, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, vol. I, 97-99 (2022) [Hebrew] (hereinafter: DOTAN, JUDICIAL REVIEW); Zamir, "Administrative Authority," 1590).

As has been made clear on more than one occasion, substantive judicial review over the products of the constituent authority is restricted to the question *whether the constituent authority exceeded its authority*. Thus, it the *Tal Law* case, it was noted that "there are grounds for the view that a law or Basic Law that would deny the character of Israel as a Jewish or democratic state is unconstitutional. The people, the sovereign, *did not empower* the Knesset to do that. It was authorized to act within the framework of the fundamental principles of the regime. It *was not authorized* to abolish them" (*ibid*., 717, emphasis added); and see: *Mizrahi*, 394). *Bar-On* similarly mentioned the possibility that the Court might be called upon "to decide whether the Knesset has *overstepped its constituent authority* and violated the basic foundations of the state as a Jewish and democratic state" (*ibid*., 312, emphasis added); *Hasson*, para. 29 of my opinion, para. 6 *per* Deputy President (emer.) Melcer, para. 13 *per* Justice (emer.) Mazuz). As noted, the legal issue of deviation from authority is given to the Court, and it can, therefore, be brought for its decision to the extent that it may arise – in extreme, extraordinary cases – in regard to the adoption of a Basic Law or its amendment.

88. Lastly, it should be emphasized that in Israel there is no body other than the Court, which is not involved in enacting constitutional norms, that can act as an "external brake" upon breaching the boundaries of constituent power (compare: AHARON BARAK, THE JUDGE IN A DEMOCRACY 109 (2004) [Hebrew]). Parenthetically, I would note that in other countries in which the limitations upon amending the constitution are enforceable, the body generally authorized to conduct the task of review is the court (see: ROZNAI, 201 and 209).

89. The Government Respondents and the Knesset raised a number of problems concerning the recognition of this Court's jurisdiction to conduct substantive judicial review of Basic Laws.

According to the Government Respondents, recognition of the Court's jurisdiction to conduct such judicial review would make Israel the only country in the world in which the Court "arrogates to itself authority to review constitutional amendments in the absence of an eternity clause, in the absence of a complete constitution, without being able to draw upon the basic structure of a nonexistent constitution" (para. 107 of the Affidavit in Response). This argument relies upon a comprehensive survey presented in their Affidavit in Response in regard to constitutional amendments in various countries. However, in my view, the question of judicial review of constitutional norms cannot be divorced from the constitutional environment in which they are adopted. In this regard, it is worth remembering that Israel is also the only country whose constitution remains in the process of creation for over seven decades, without any end date in sight; in which the political majority enjoys complete control over the adoption of the constitution-in-formation, and that has the power to approve constitutional norms in a very simple process that is identical to the process for approving regular legislation. Indeed, there is good reason for noting that "trying to learn from the experience of other constitutional systems in this regard is complex" (*Hasson*, para. 12, *per* Justice Barak-Erez).

90. Another argument raised by the Knesset and the Government Respondents is that placing judicial review of Basic Laws in the hands of the Court – as a non-representative body – violates the principles of the sovereignty of the people. This argument cannot be accepted. Approving a Basic Law that would violate the core of the Jewish and democratic identity of the state does not express a realization of the sovereignty of the people but its opposite. It is a clear deviation from the limited power held by the Knesset when wearing the constituent authority hat that it was given

in trust by the people (see and compare: *Hasson*, para. 5, *per* Deputy President (emer.) Melcer; Yaniv Roznai, "Radical Conservatism and the Unconstitutional Constitutional Amendment Doctrine," ICON-S Essays: Essays in Public Law (2022) [Hebrew]). Indeed, "in a democratic state sovereignty rests in the hands of the people. The Knesset does not have sovereignty; neither does the government, nor the courts" (*Mizrahi Bank*, 399). Therefore, in exceptional circumstances in which the public's elected representatives breach the people's trust and deviate from their constituent power, the fact that the Court is not a representative body is not to its detriment in this regard. Its being an apolitical, independent body is what makes it the institution that the can provide an effective response in such edge cases (compare: Barak Medina, "Does Israel have a Constitution? On Formal and Liberal Democracy," 44 IYUNEI MISHPAT 5, 29-30 (2021); DOTAN, JUDICIAL REVIEW, 71).

91. The Knesset and the Government Respondents further argue that judicial review of Basic Laws is incompatible with the holding in *Mizrahi Bank* that premised the authority to conduct judicial review of regular legislation upon the fact that Basic Laws are at the top of the normative pyramid. I find this argument perplexing. *Mizrahi Bank* focused upon the issue of the normative superiority of Basic Laws over regular legislation. But there is no necessary connection between the supreme status of one type of norm as opposed to a norm of a another type and the existence of limitations upon the power to create that superior norm (Barak, "Declaration of Independence," 35). Indeed, the possibility of conducting judicial review in cases in which the Knesset might deviate from its constituent power was already mentioned in *Mizrahi Bank*, but resolving that issue was not required in that case (*ibid*., 394). In any case, to remove all doubts, we should make it clear that substantive judicial review of Basic Laws focuses upon maintaining the boundaries of the power of the constituent authority and does not rely upon the existence of any norms that stand above the Basic Laws in the normative hierarchy (compare: *Hasson*, para. 8, *per* Justice Sohlberg; and see: Alon Harel, "'Jewish and Democratic' – The Legal Justification for voiding Basic Laws," DYOMA (Aug. 14, 2023) https://dyoma.co.il/law/1972).

Another argument concerning *Mizrahi Bank* is that the unique structural characteristics of our constitutional system – like the ease in enacting Basic Laws – were already known, and nevertheless, they were given superior normative status, whereas now, those characteristics serve as a justification for conducting judicial review over the Basic Laws themselves. Indeed, no one

disputes that the possibility of adopting and changing Basic Laws by a simple procedure is not ideal in a constitutional democracy. There have even been those of the opinion that this can justify, to some degree or other, denying their superior normative status (see, e.g.: Porat, "Constitutional Politics," 222; and also see: Ruth Gavison, "The Constitutional Revolution – Reality or Self-Fulfilling Prophecy," 28 MISHPATIM 21 (1997) [Hebrew]). I consider this a far-reaching conclusion. It is possible to recognize that there are flaws in our constitutional system without relinquishing the important advantages that inhere in the existence of supreme constitutional norms that define the character of the state, express the "agreement upon the shared rules of the game", ensure that all the actions of the governmental agencies will conform with them, serve as a source for interpreting all the legal norms, and that embody an important educational value for the entire nation" (RUBINSTEIN & MEDINA, 54-55; and see: HCJ 1384/98 *Avni v. Prime Minister* [57] 210). On the contrary, recognizing the possibility of granting relief in those exceptional cases in which our system's structural flaws may be exploited in a manner that might yield a destructive result defends the continued existence of the Israeli constitutional process.

92. The Knesset and the Government Respondents further argue that the Court does not have the jurisdiction to perform judicial over Basic Laws because its authority derives from a norm of the same status, i.e., Basic Law: The Judiciary. This argument does, indeed, raise a theoretical problem of some significance, and I accept that the "constitutionality" of Basic Laws cannot be reviewed in accordance with the tests set out in the limitation clause by which the constitutionality of regular laws is examined (see: *Ben Meir*, para. 20 of my opinion; HCJ 1368/94 *Porat v. State of Israel* [58] (hereinafter: *Porat*)). A possible conflict between one Basic Law and another also does not, itself, constitute grounds for judicial intervention (*Hasson*, para. 49 of my opinion). Indeed, as long as we are concerned with a valid constitutional norm, and as long as the constituent authority acts within the boundaries of its authority, its actions are not subject to judicial review. This is the case in view of the fact that Basic Laws are to be "found at the apex of the positive normative hierarchy" (*Hasson*, para. 32 of my opinion).

However, in those situations in which a Basic Law or an amendment to a Basic Law was adopted through a clear deviation from the boundaries of the Knesset's constituent power, no *valid constitutional norm* was actually created. In other words, alongside the other conditions examined to date, among them the procedural requirements like changing a Basic Law by a particular

majority in accordance with the "rigidity" clause (see and compare: *Porat*; Ben Meir, para. 10, *per* Justice Mazuz), and identifying a norm as one that is, indeed, on the constitutional level (in accordance with the abuse of constituent power doctrine) – it must be ascertained that the constituent authority acted with authority when it adopted it. If the constituent authority exceeded its powers, the Court's jurisdiction to conduct judicial review relies upon the fact that no valid constitutional norm was created that can be recognized as superior to other norms.

93. Lastly, the Government Respondents point out that there is no place for permitting judicial review over Basic Laws inasmuch as if the constituent authority is intent upon destroying the democratic regime, a judgment of this Court will not prevent it from doing so. In this regard, they note that "a regime is not designed and authorities are not established on the basis of horror scenarios" (para. 279 of the Government Respondents' Affidavit in Response).

I take a different view. In my opinion, the need to forestall extreme scenarios is the basis for many constitutional arrangements, and in this regard, I need only turn to what was already decided in this regard in the 1980s: "[…] constitutional norms cannot be built on hopes. Basic principles of government are not shaped on the assumption that all will proceed as planned. Quite the contrary. The entire constitutional edifice is testimony to the realization that checks and balances must be provided" (HCJ 428/86 *Barzilai v. Government* [59] 606). Moreover, the Government Respondents' argument ignores the possibility that the severe harm to the state's democratic core might be carried out in stages, and that judicial review may aid in putting a stop to the democratic decline before the total collapse of the system (see: Rosalind Dixon & David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment," 13 INT'L J. CONST. L. 606, 636 (2015)).

94. Thus, having recognized that the constituent authority is not unrestricted and may exceed its authority, the problems raised by the Government Respondents and the Knesset do not, in my view, negate the need for judicial review to examine whether the Knesset deviated from its constituent power. This review is necessary given the unique structural characteristics of Israel's constitutional project and the extremely problematic practice that has taken root in our system in all that relates to exercising constituent power. It is also consistent with the nature of the Court's function and with it being the most appropriate (in fact, the only) body for carrying out such review.

Therefore, I am of the opinion that in those extreme cases in which the Knesset adopts or changes a Basic Law such that it presents an element that facially denies or contradicts the core characteristics of Israel as a Jewish and democratic state, this Court's authority to decide that the Knesset deviated from its constituent power and that the constitutional norm is invalid must be recognized.

95. It is important to emphasize that the possibility of conducting substantive judicial review of Basic Laws is very exceptional. It derives from the Israel's unique governance regime, and therefore, the Court must exercise it with maximum restraint and "take great care in order to prevent slipping into a 'routine' of petitions challenging Basic Laws or provisions in Basic Laws on the claim of deviation from constituent power" (*Hasson*, para. 13, *per* Justice (emer.) Mazuz).

It is also important to emphasize that my conclusions in regard to the question of judicial review of the Knesset's constituent power rely upon the existing constitutional situation. As has already been clarified in the case law of this Court: "The legitimacy of judicial review is tied, at least in part, to the process that led to the constitutional amendment. In other words, the more complex, inclusive, and comprehensive the work of the constituent authority, the greater the democratic legitimacy that will be ascribed to its results, and accordingly, the appropriateness of judicial review will decrease" (*ibid*., para. 2, *per* Justice Baron; ROZNAI, 219-220). Therefore, if a rigorous, dedicated process for adopting and amending Basic Laws is established in the future, it will be appropriate to reexamine the issue of judicial review in regard to Basic Laws adopted through that process. However, as long as that is not the constitutional reality, I am of the opinion that this Court's jurisdiction to intervene in those extreme cases in which the Knesset exceeds its powers as a constituent authority should be recognized.

D. Interim Summary

96. The constitutional history of the State of Israel is exceptional and unusual. The promise to establish a constitution for the state – a promise expressly included in the Declaration of Independence – has not yet been realized even after more than 75 years. Instead, the Knesset decided to create our constitution "chapter by chapter" by means of enacting Basic Laws. In

Mizrahi Bank, the Court affirmed that these Basic Laws are constitutional norms that stand at the apex of the normative pyramid. However, in that same matter, two questions were left undecided – one relating to a situation in which the Knesset may abuse the title "Basic Law", and the second concerning a situation in which the Knesset might exceed its constituent power.

Over the last few years, against the background of the improper trend of changing Basic Laws at a dizzying pace at the initiative of the political majority in the Knesset, the Court has been forced to address these questions. In regard to the first question, the Court employed the abuse of constituent power doctrine to examine whether arrangements established in a Basic Law were properly established at the constitutional level in terms of their formal-procedural characteristics. As for the second question, concerning the content of basic legislation, *Hasson* first made it clear that the power of the constituent authority is not unlimited, and that it is not authorized to facially deny or negate the core characteristics of the State of Israel as a Jewish and democratic state. Today, we must take another step and hold that in rare cases in which "the beating heart of the 'Israel-style' constitution" is harmed (*Hasson*, para. 18 of my opinion), this Court may declare that a Basic Law that reflects a deviation from the Knesset's constituent power is void. This is the case in view of the unique structural characteristics of the Israeli constitutional system, and given the constitutional practice over the last years that demonstrates the ease by which our system can be changed fundamentally.

Part Two: Amendment no. 3 to Basic Law: The Judiciary

97. Amendment no. 3 to Basic Law: The Judiciary, which is the focus of the petitions at bar, blocks any possibility of holding a judicial hearing or of issuing judicial orders in regard to the reasonableness of decisions by the Government, the Prime Minister, and the government ministers. The petitioners, as noted, pointed to three serious defects that they believe require the voiding of the Amendment. The first defect – which was the focus of the hearing on Sept. 12, 2023 – concerns the *content* of the arrangement. In this regard, it is argued that the Amendment inflicts very serious harm upon the core characteristics of Israel as a democratic state, and that the Knesset deviated from its constituent power in enacting it. The second defect focuses upon the *formal characteristics* of the arrangement. In this regard, the Petitioners argue that the arrangement established by the

Amendment does not bear the hallmarks of a constitutional norm. Therefore, enacting it constituted an abuse of constituent power. The third defect concerns a list of serious defects that the Petitioners claim occurred in the *process* of adopting the Amendment.

I will begin hysteron proteron in saying that in Israel's current constitutional situation, the amendment that is the subject of the petitions, which *comprehensively* abolishes judicial review of the reasonableness of all the decisions at the elected echelon, indeed inflicts severe harm to the principle of separation of powers and the principle of the rule of law. This severe harm to two of the clearest characteristics of the State of Israel as a democratic state can have significant, unprecedented influence upon the individual and upon the public as a whole. I am, therefore, of the opinion that there is no recourse but to hold that in adopting Amendment no. 3. The Knesset deviated from its constituent power and the Amendment must be declared void. In view of this conclusion, I will primarily address the reasons that ground it, and suffice with a few comments upon the other two defects raised by the Petitioners.

A. Threshold argument: The ripeness of the petitions

98. The Knesset is of the opinion that the petitions should be dismissed *in limine* because, in its view, the factual and legal foundation required for deciding upon the issues raised by the petitions has not yet crystallized. In this regard, it is argued that the consequences of the Amendment are not yet entirely clear and largely depend upon the manner in which the Amendment will be interpreted by the courts, its influence upon the operation of the Government and its ministers, and upon the Knesset's ability to impose the duty of reasonableness upon the elected echelon. Under these circumstances, the Knesset argues, "it would be inappropriate to use the 'doomsday weapon' of voiding a Basic Law on the basis of doubts and speculations" (para. 358 of the Affidavit in Response).

99. The ripeness doctrine, adopted by our legal system over the last few years, reflects the fundamental conception of restraint and caution that the Court exercises in conducting judicial review (*Ben Meir*, para. 3, *per* Justice Mazuz). This doctrine serves the Court as a tool for controlling and regulating the constitutional issues that need to be addressed and decided, and it concerns an evaluation of the point in time when it would be proper for the Court to examine a given issue (*ibid*.; HCJ 2311/11 *Sabah v. Knesset* [60] para. 12, *per* President Grunis (hereinafter:

Sabah)). It is intended "to spare the Court from the need to address matters that are not yet ripe for a judicial decision because their claimed harm is purely speculative and may never come to pass" (HCJ 3803/11 *Association of Capital Market Trustees v. State of Israel* [61] para. 15. *per* Deputy President E. Rivlin; and see: HCJ 3429/11 *Alumni Association v. Minister of Finance* [62] para. 28, *per* Justice M. Naor).

100. Typically, the question of a petition's ripeness arises in situations in which the challenged legislation has not yet been implemented in practice. However, it has already been held that a lack of implementation is not itself sufficient to show that a particular petition is not ripe for deciding (see: *Sabah*, para. 15, *per* President Grunis; HCJ 1308/17 *Silwad Municipality v. Knesset* [63], para. 35 of my opinion). Thus, for example, it has been held that a petition is ripe for decision when the constitutional question that it raises is primarily legal and the response to it does not require a detailed factual situation or concrete implementation (*Ben Meir*, paras. 8-9 of my opinion; and see: HCJ 3166/14 *Gutman v. Attorney General* [64] para. 43, *per* President Grunis). It was further held that in deciding upon the ripeness of a petition, the Court must weigh the public interest in addressing it and consider the consequences of postponing the judicial decision upon the harm to the rule of law and legal certainty (*Sabah*, para. 16, *per* President Grunis).

101. In my opinion, application of the ripeness doctrine is inappropriate in the case at bar. The questions raised by these petitions are purely legal questions that concern, inter alia, the extent of the Amendment's harm to the core of the constitutional project and to the Knesset's observance of the limitations upon it when wearing its constituent authority hat. The aspects necessary for deciding these questions were presented to us, and I do not think that a future factual development would materially contribute to deciding upon the petitions. In this sense, one can say that we have before us a real, clear dispute and a concrete implementation of the Amendment is unnecessary for its crystallization (see and compare: *Hasson*, para. 12 of my opinion).

The Knesset argues that if unreasonable decisions are made by the Government, the Prime Minister, or one of the ministers in the future and a petition is filed arguing that the decisions are unreasonable in the extreme, "it will be possible to examine the consequences of the amended Basic Law on the basis of a concrete factual foundation" (para. 298 of the Affidavit in Response). This argument is surprising inasmuch as the Amendment expressly forbids the courts, including

this Court, "to address" the reasonableness of decisions by the Government and its ministers. That being the case, it is not clear how the courts might address petitions in such matters, should they be filed. Similarly, the Knesset's argument that the petitions be dismissed because the ramifications of the Amendment for the Government's conduct and the effectiveness of Knesset oversight have not yet become clear also raises a considerable problem. This is so, inter alia, because the Amendment already directly influences the relationship between the individual and the government and is relevant to many decisions made on a daily basis by the Government and its ministers. Indeed, as the Knesset itself points out, there are already pending proceedings that raise arguments concerning the reasonableness of decisions by the elected echelon (para. 274 of the Affidavit in Response).

102. Under these circumstances and given the clear public interest in addressing the petitions on the merits, I am of the opinion that the Knesset's claim of a lack of ripeness should be dismissed.

B. Examining the harm to the "core characteristics" of the State of Israel

103. The Petitioners' main argument – in which the Attorney General joins – is that the Amendment that is the subject of the petitions represents a deviation from the boundaries of the Knesset's constituent power.

The Knesset exceeds its constituent powers if it enacts a Basic Law or an amendment to a Basic Law that "denies or facially contradicts the 'core characteristics' that form the minimal definition of the State of Israel as a Jewish and democratic state" (*Hasson*, para. 29 of my opinion). The core characteristics of the State of Israel as a *Jewish state* as previously held in the case law are primarily – "the right of every Jew to immigrate to the State of Israel, in which Jews will be a majority"; the Hebrew language as the country's primary language; and the holidays, symbols and heritage of the Jewish people being part of the state's identity (*Tibi*, 22). As for the *democratic* characteristics, reference is usually made to "recognition of the people's sovereignty as expressed in free, equal elections; recognition of the core of human rights, among them dignity and equality, maintaining the separation of powers, the rule of law and an independent judiciary" (*ibid*., 23; and see: HCJ 1661/05 HCJ 1661/05 *Gaza Coast Regional Council v. Knesset* [65] 565, (hereinafter:

Gaza Coast); HCJ 5026/04 *Design 22 v. Rosenzweig* [66] 53-54; EDA 1806/19 *Lieberman et al. v. Cassif et al.* [67] para. 13 of my opinion (hereinafter: *Cassif*)).

We are not concerned with a closed or comprehensive list, but to the extent that it is claimed that there are additional nuclear characteristics, they must reflect the core Jewish and democratic identity of the state at a level of importance similar to the characteristics noted above.

104. The *Hasson* case addressed the question of how to examine the presence of harm to "the core characteristics" only in brief. That was the case inasmuch as in that matter there was no need to decide upon the Court's jurisdiction to conduct substantive judicial review of Basic Laws.

The matter before us requires that we decide that issue. Therefore, I will first address matters of principle raised by the parties in this regard.

105. The Association and the other civil society organizations argued that Amendment no. 3 constitutes a deviation from constituent power in accordance with the standard established in *Hasson*. However, in their view, the reality of the Israeli regime requires establishing a lower bar for intervention in Basic Laws that would examine whether there was a disproportionate violation of a core principle of the constitution or of the Basic Law (paras. 251-260 of the Association's Brief. This suggestion is based upon ROZNAI, 220-221).

I cannot accept this suggested standard in regard to the Basic Laws. The very existence of judicial review of the contents of Basic Laws is no small matter. This review derives from Israel's exceptional constitutional reality, as I noted (see paras. 72-83, above), and in my opinion, it is proper that it limit itself only to those edge cases in which a Basic Law will lead to unusual harm to the Jewish or democratic hallmarks of the state. I do not think that it would be proper in this regard to adopt tests materially similar to those that serve the judicial review of primary legislation and of administrative acts (see and compare: *The Tal Law*, 717; *Ben Meir*, para. 36 of my opinion).

106. On the other hand, I am not of the opinion that the already high bar for intervention should be raised to the point that we will eviscerate the possibility of intervening in situations in which the Knesset exceeded its authority. In particular, and as opposed to the argument of the Knesset Legal Advisor in the hearing on Sept. 12, 2023, we emphasize that the question is not whether the

Basic Law turns the State of Israel "into a state that is not democratic, i.e., a dictatorship" (p. 27 of the Transcript). The question that should be asked is whether the Basic Law or the amendment to the Basic Law causes harm to the core characteristics of the state that is so severe that it shakes the building blocks of our constitution-in-formation. To the extent that that is the case, the conclusion is that we are concerned with a Basic Law that exceeds the constituent power of the Knesset.

107. Another argument raised by the Knesset in its Affidavit in Response is that judicial review of the content of basic legislation must be in accordance with the bar established in regard to disqualifying candidates and lists from participation in the elections, in accordance with sec. 7A of Basic Law: The Knesset (and compare: Weill, "Hybrid Constitution," 566-567). In other words, according to the Knesset, intervention in a Basic Law is possible only if we are concerned with a constitutional change where supporting it would lead to the disqualification of a candidate or a list from standing for election. In my view, this approach compares apples with oranges. The tests established in regard to the grounds for disqualification in sec. 7A of Basic Law: The Knesset are all based upon the specific context of that section and in particular, upon the fact that disqualifying a candidate or list severely infringes the right to vote and to be elected, which is "the life breath of every democratic regime" (*Cassif*, paras. 3 and 12 of my opinion). The abuse of constituent power doctrine concerns an entirely different situation – it examines a completed constitutional product that was placed at the apex of the normative hierarchy and that affects the entire system. Establishing that such a provision in a Basic Law is invalid, in circumstances in which the Knesset exceeded its authority, is intended to remedy severe harm to the constitutional order, and it does not involve the *a priori* (sec. 7A of the Basic Law) or *post facto* (sec. 42A(3) disqualification of a person or list from the Knesset. That being the case, although, as in disqualifying candidates and lists, intervention in basic legislation should be reserved only for exceptional, rare cases, we must examine each of these issues in accordance with the standards relevant to the matter.

108. Harm to the core characteristics can be in theory or in practice (see: *Hasson*, para. 30 of my opinion). In other words, there are two possible situations in which a deviation from constituent power may occur. One situation is that of a *declaratory* disengagement from the character of the state or from a specific core characteristic. For example, rejecting the definition of Israel as a Jewish state or rejecting the status of the Hebrew language. In cases such as these, even without

examining the influence of the constitutional change in practice, it is clear that we are concerned with a change that facially contradicts the constituting narrative of the Israeli constitution, and it cannot be left in place without it leading to a fundamental change of the constitutional project.

109. Harm in practice to the core characteristics of the state is a case of such a clear deviation from the Knesset's constituent power that, should such a thing ever occur, grounds for the Court's intervention would clearly arise. The cases in which the question might arise in regard to the Knesset's exceeding its constituent power are primarily cases of *actual* harm to one of the core characteristics of the state. In such cases, we must seek out the effect of the constitutional change in terms of its result. This test cannot take place in a vacuum. In order to understand the nature and magnitude of the harm, we must examine, as a starting point, the *existing* constitutional system alongside the change in the Basic Law and decide whether, under the circumstances, any of the core characteristics of the state were negated or facially contradicted.

We cannot rule out a situation in which a consecutive series of amendments to the Basic Laws will cumulatively lead to harm to the constitutional core (see and compare: TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 90-95 (2018); David Landau, "Abusive Constitutionalism," 47 UCLA L. REV. 189 (2013)). However, particular care must be taken in this context, including in regard to the arguments raised by the Petitioners and the Attorney General that in the framework for examining the actual influence of an amendment to a Basic Law, weight should be given to other legislative initiatives that are "in the pipeline" but that have not yet been adopted. A fundamental principle that derives from the principle of separation of powers is that the Court does not examine bills before they have been approved and have made their way into the lawbook. This is so, inter alia, because it is not at all clear how they will be adopted in the end, if at all (see and compare: HCJ 1234/23 *Arad v. Minister of Justice* [68] para. 3; HCJ 1210/23 *Oron v. Knesset Constitution, Law and Justice Committee* [69] para. 3).

110. In the matter before us, Amendment no. 3 to Basic Law: The Judiciary does not blatantly declare the abandonment of any particular core characteristic of our system. The severe harm pointed out by the Petitioners and the Attorney General is primarily focused upon the *result*. Therefore, we must examine the significance of the Amendment in practice, against the

background of the existing constitutional situation in regard to those aspects addressed by the Amendment. I shall now proceed with that examination.

C. The importance of judicial review of the Government's actions

111. The issue addressed by Amendment no. 3 is that of judicial review, or more precisely – the abolition of judicial review in all that concerns the reasonableness of decisions by the Government, the Prime Minister, and the ministers. As noted, in order to understand the significance and consequences of the Amendment, one must understand the broad constitutional context and the place of judicial review in our system. In the first part of this opinion, I noted the Government's exceptional control over the proceedings for adopting Basic Laws. As will be explained below, this is but one aspect of the great, almost unlimited power concentrated in the hands of the ruling majority in Israel. Therefore, in the absence of an effective system of checks and balances, judicial review is, in fact, *the only effective check* upon that power.

112. First, as already noted, in our parliamentary system the Government "controls" the Knesset in practice (*Quintinsky*, para. 39, *per* Justice Sohlberg). While the Government serves on the basis of the Knesset's confidence, in practice, in the usual course of things, the Government enjoys an "automatic majority" in the Knesset, and it can be said that "in many ways, it is not the government that is the Knesset's 'executory agent', but rather the Knesset is the government's 'legislative agent'" (DISTRIBUTION OF POWER, 76). As already noted, this is expressed in the mechanisms of coalition discipline and the Ministerial Committee for Legislation, which lead to a situation in which, in effect, the Government – in particular the Prime Minister and the senior ministers (the "nucleus of control" of the coalition majority) – are the ones who decide the fate of bills in the Knesset (*Gutman*, 217; Amichai Cohen & Yaniv Roznai, "Populism and Israeli Constitutional Democracy," 44 IYUNEI MISHPAT 87, 122-123 (hereinafter: Cohen & Roznai); and see: HCJ 2144/20 *Movement for Quality Government v. Speaker of the Knesset* [70] para. 11 of my opinion (hereinafter: *Edelstein*); *Academic Center*, para. 14, *per* Deputy President (emer.) Rubinstein). As noted, this Government control over legislative proceedings is also relevant to the enactment of Basic Laws, given the simple procedure required for their enactment or amendment, and this allows the Government to change the constitutional "rules of the game" as it sees fit.

The institution of non-confidence, which is one of the Knesset's primary tools for overseeing the Government, has also been significantly diminished over the years, and it now requires a vote of confidence in another Government by a majority vote of the Knesset (a system referred to as a "constructive vote of no confidence"; sec. 28 of Basic Law: The Government; for a detailed discussion, see: *Rotation Government*, paras. 4-5 of my opinion). This, while the Prime Minister, with the consent of the President, is granted the authority to dissolve the Knesset by means of an order (sec. 29(a) of Basic Law: The Government). This constitutes something of a challenge to the very principle that "the Government rules by virtue of [the confidence of] the Knesset and not the reverse" (SHIMON SHETREET, THE GOVERNMENT: THE EXECUTIVE BRANCH – COMMENTARY ON BASIC LAW: THE GOVERNMENT 509 (Itzhak Zamir, ed., 2018) [Hebrew] (hereinafter: SHETREET).

To this we should add additional aspects that strengthened the Government's hold upon the Knesset over the last few years, first among them the lengthy tenure of transition governments that hold powers similar to those of a regular government, even though they do not act on the basis of the Knesset's confidence (HCJ 6654/22 *Kohelet Forum v. Prime Minister* [72] para. 6 of my opinion (hereinafter: *Kohelet Forum*). We should also take note of the enactment of the "Norwegian Law", which allows Members of Knesset who have been appointed as ministers or deputy ministers to resign from the Knesset such that they are replaced by the next in line on their list, but at the end of their tenure in the Government, they may return to serve in the Knesset in place of the "replacement" Members of Knesset (sec. 42C of Basic Law: The Knesset; see: HCJ 4076/*20 Shapira v. Knesset* [73]). Thus, those "replacement" Members of Knesset may feel an excessive sense of obligation to the Government, knowing that their continued tenure depends upon its goodwill (SHETREET, 324-325). Over the last few years, the arrangement has been expanded in a manner that permits more ministers and deputy ministers to resign, and as of September 2023, *more than a quarter* of the Members of Knesset from the coalition replaced members of the Government who had resigned from the Knesset (para. 225 of the Attorney General's affidavit).

Against this background, it can be said that "the Government shook the Israeli system of government, almost completely eradicated the distribution of powers between the political

branches, and at present, it effectively concentrates both executive and legislative power in its hands" (*Gutman*, 198).

113. Despite the unprecedented power concentrated in the executive-legislative branch, which makes it a kind of "super branch", there is almost no limitation upon that power. It is worth noting in this regard research that examined five mechanisms for the distribution of political power in 66 countries classified as "free countries' by Freedom House: (1) separation of the legislature into two bodies or "houses", (2) a presidential system that creates a clear separation between the legislature and the executive, (3) a federal system based upon a division of power between the central government and the "states" of the federation, (4) a regional system of elections that requires elected representatives to grant weight to "local" interests, (5) membership in international bodies like the European Union or regional human rights courts that influence the conduct of the state (see a summary of the research in Cohen & Roznai, 117-122; for a more detailed discussion, see AMICHAI COHEN, CHECKS AND BALANCES: THE OVERRIDE CLAUSE AND ITS EFFECT ON THE THREE BRANCHES OF GOVERNMENT 14-23 [Hebrew] (hereinafter: COHEN, CHECKS AND BALANCES). The research found that Israel is the *only* country that has none of those structural limitations upon the power of the political majority (Cohen & Roznai, 122). To that we should add the fact that Israel does not have an entrenched, stable constitution that provides significant protection from governmental power. Prof. Itzhak Zamir described this well:

> […] I doubt that there is another democratic country in the western world in which the Government enjoys as much power as the Government in Israel. As opposed to that power, the system of checks and balances that is accepted throughout the world as a vital system for preventing abuse of governmental power is more meagre and weaker than in other democracies (ZAMIR, ADMINISTRATIVE POWER, 3610).

114. Under these circumstances, judicial review over the legislative and executive branches in Israel is the only effective mechanism that can serve to limit the centralized power of the majority in any real way (COHEN, CHECKS AND BALANCES, 25; DISTRIBUTION OF POWER, 64). There are, of course, gatekeepers and other oversight and control mechanisms in our system (see: ZAMIR, ADMINISTRATIVE POWER, 2319-2320), but judicial review is the most important mechanism in the

state's system of checks and balances (*ibid*., 101), and "without it, governmental discretion becomes unlimited, and nothing is more foreign to the democratic character of our system" (*Gaza Coast*, 756).

115. The primary institution responsible for conducting judicial review in our system, particularly when Government and ministerial decisions are concerned, is the Supreme Court sitting as High Court of Justice (see: DAPHNE BARAK-EREZ, ADMINISTRATIVE LAW, VOL. 4 – PROCEDURAL ADMINISTRATIVE LAW 49 (2017) [Hebrew] (hereinafter: BARAK-EREZ, PROCEDURAL ADMINISTRATIVE LAW)). This Court was given broad authority to grant relief for the sake of justice and to issue orders to all state authorities, which has its roots in the Mandatory period (art. 43 of the Palestine Order-in-Council, 1922-1947 (hereinafter: the Order-in-Council); sec. 7 of the Courts Ordinance, 1940), as well as in "regular" legislation (sec. 7 of the Courts Law, 5717-1957), and as noted, it is now anchored in the provisions of sec. 15 of Basic Law: The Judiciary, which grounded the status of the High Court of Justice as "a foundation stone of the system of checks and balances between the branches in Israel (BARAK-EREZ, PROCEDURAL ADMINISTRATIVE LAW, 51; and see: HCJ 971/99, 140).

116. Given the fact that the system of checks and balances in Israel is *ab initio* weak and fragile, significant harm to the jurisdiction of the courts – and the High Court of Justice in particular – to conduct judicial review may bring about a facial contradiction in regard to at least two of the core characteristics of the State of Israel as a democratic state – the separation of powers and the rule of law, regarding which is has already been stated:

> The rule of law cannot be maintained in the absence of judicial review […] Indeed, the effective existence of law requires effective judicial review. Without judicial review over the executive branch, the *separation of powers* is undermined. With it, human liberty is impaired and the foundations of a free regime are impaired (HCJ 294/89 *National Insurance Institute v. Appeals Committee* [74] 450 (hereinafter: *National Insurance Institute*) (emphasis added); compare: ZAMIR, ADMINISTRATIVE POWER, 98).

D. The significance of the Amendment

117. Having addressed the Israeli constitutional reality in which Amendment no. 3 to Basic Law: The Judiciary was adopted, I will now examine the Amendment itself.

D.1. Interpretation of the Amendment

118. In order to provide a complete picture, I will present the full text of sec. 15 of Basic Law: The Judiciary, to which the amending provision was added in sec. 15(d1):

> *The Supreme Court*
>
> 15. (a) The seat of the Supreme Court is Jerusalem.
>
> (b) The Supreme Court shall hear appeals against verdicts and other rulings of the District Courts.
>
> (c) The Supreme Court shall also sit as a High Court of Justice. When so sitting, it shall deliberate matters in which it deems it necessary to provide relief for the sake of justice, and are not under the jurisdiction of another court or tribunal.
>
> (d) Without prejudice to the generalness of the provisions in clause (c), the Supreme Court sitting as High Court of Justice, is authorized -
>
> (1) To grant orders for the release of persons unlawfully detained or imprisoned;
>
> (2) To grant orders to state authorities, to local authorities, to their officials, and to other bodies and persons holding public office under the law, to act or refrain from acting while lawfully exercising their duties, and if they were unlawfully elected or appointed - to refrain from acting;
>
> (3) To grant orders to courts, to tribunals, and to bodies and persons with judicial or quasi-judicial authority under the law - save courts that this law relates to, and save religious courts - to deal with a

certain matter, or avoid dealing with, or continue to deal with a certain matter, and cancel a proceeding held or a ruling given unlawfully;

(4) To grant orders to religious courts to deal with a certain matter on the basis of their jurisdiction, or to avoid dealing or continuing to deal with a certain matter that falls outside their jurisdiction, provided that the court shall not entertain a request under this paragraph, should the appellant not have raised a question of jurisdiction at the earliest opportunity that he had; and if he did not have a reasonable opportunity to raise the question of jurisdiction before the ruling by the Religious Court, the court is entitled to quash a proceeding that took place, or a ruling that was given by the Religious Court without authority.

(d1) *Notwithstanding what is stated in this Basic Law, a holder of judicial authority under law, including the Supreme Court sitting as the High Court of Justice, shall not address the reasonableness of a decision by the Government, the Prime Minister or a Government Minister, and will not issue an order in such a matter; in this section, "decision" means any decision, including in matters of appointments, or a decision to refrain from exercising authority*.

(e) Other powers of the Supreme Court shall be prescribed by law.

119. The parties to these proceedings disagree as to the interpretation of sec. 15(d1) of the Basic Law. The Knesset is of the opinion that the Amendment can be construed narrowly such that it would apply only to the reasonableness standard as set out in *Dapei Zahav*, and not to "absurd" decisions that could have been voided on the basis of the standard as it was prior to that judgment. According to the Knesset, this construction, along with the broad construction of other laws and standards of review would lessen the problems raised by the Amendment, and that is preferable to its being voided.

120. All the other parties to the petitions – the Petitioners, the Attorney General, and like them, the Government Respondents and the Chair of the Constitution Committee as well – do not agree with the Knesset's position and are all of the opinion that such narrow interpretation is not possible. The Petitioners emphasize that the interpretation suggested by the Knesset would actually constitute judicial lawmaking, and that "absurdity" is part of the reasonableness standard that cannot be addressed separately from it (see: paras. 103-105 of the Summary Brief of the Petitioners in HCJ 5659/23; and pp. 123-154 of the Transcript of the hearing of Sept. 12, 2023). The Attorney General is of the opinion that adopting a construction that would narrow the application of the Amendment to a particular meaning of "reasonableness" or to a particular category of "decisions" is not consistent with the language of the Amendment, contradicts the constituent intent – which expressly rejected those distinctions in the framework of the legislative process – and it constitutes a kind of redrafting of the arrangement by the Court (paras. 428 and 435 of the Attorney General's affidavit).

The Government Respondents are also of the opinion that there is no place for adopting such a narrow construction. In their view, it contradicts the language of the Amendment and the constituent intent, and they emphasize that in the absence of an actual possibility to distinguish the various meanings of the reasonableness standard, the constituent authority chose to make a "conclusive distinction" that would limit the boundaries of the standard on the basis of the identity of the decision maker alone. Therefore, it is the position of the Government Respondents that the Amendment should be construed in a manner that applies it to "any and every type" of reasonableness "even if someone might think that the decision was unreasonable in the extreme in accordance with *Wednesbury*" (para. 45 of the Government Respondents' Supplemental Pleadings); and see: the statement of the Government Respondents' attorney at pp. 60-63 of the Transcript of Sept. 12, 2023). The Chair of the Constitution Committee, MK Rothman, expressed a similar view, noting that the Amendment prevents all judicial review of the reasonableness of decisions by the elected echelon in all the senses of the standard (pp. 37-39 of the Transcript of Sept. 12, 2023).

121. The question before us is, therefore – as the Knesset's attorney suggested – is it possible to interpret the Amendment in a manner that limits its application only to a particular meaning of "reasonableness"?

I do not think so. In my opinion, such a construction lacks any foothold in the language of the Amendment, it expressly contradicts the legislative history and the subjective purpose of the Amendment, and deviates from the legitimate boundaries of interpretation, as will be explained below.

122. Indeed, we have a rule that "it is preferable to limit the scope of a law through interpretation, rather than achieve that very same limitation by declaring a part of that law as being void" (HCJ 4562/92 *Zandberg v. Broadcasting Authority* [75] 814 (hereinafter: *Zandberg*); and see: HCJ 9098/*01* Ganis v. Ministry of Building and Housing [76] (hereinafter: *Ganis*); HCJ 781/15 *Arad Pinkas v. Committee for Approval of Embryo Carrying Agreements* [77] para. 21 of my opinion (hereinafter: *Arad Pinkas*)). This rule in regard to the preference for employing interpretative tools rather than addressing the validity of the law, which was established in regard to the interpretation of primary legislation, is all the more appropriate to the interpretation of Basic Laws (*Hasson*, para. 59 of my opinion).

123. However, interpretation, and constitutional interpretation in particular, must be grounded in the language of the text, and it is first and foremost derived from it (AHARON BARAK, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION 135 (1994); Aharon Barak, "The Interpretation of Basic Laws," 22 MISHPATIM 31, 34-35 (1992). In this regard, it has been held:

> The constitutional reasons that limit the power of a judge as an interpreter apply with full force when the judge interprets a constitutional text. Specifically in this situation, he must demonstrate great caution not to cross the linguistic border and create a new constitutional text (HCJ 2257/04 *Hadash-Ta'al Faction v. Chair of the Central Elections Committee for the 17th Knesset*, [78] 710).

Therefore, the language of the constitutional text is always the starting point for the interpretation of its provisions. The linguistic basis, although it is not the only element in translation, it the one that distinguishes between "the writing of a new work and the interpretation of an existing work" (Aharon Barak, Interpretation and Judging: Principles of an Israeli Theory of Interpretation," SELECTED ESSAYS, vol. 1, 121, 138 (2000) [Hebrew]; and see: CA 8569/06

Director of Land Taxation v. Polity [79] 307 (hereinafter: *Polity*); CFH 5783/14 *Tzemach v. El Al Israel Airlines, Ltd.* [80] para. 52).

124. I have not lost sight of the interpretive principle established in regard to restricting judicial review – which is the subject of the Amendment – according to which the legislature is presumed not to intend to infringe the authority of the Court and therefore, such legislation should be interpreted "strictly and narrowly" (*National Insurance Institute*, 451; HCJ 212/03 *Herut v. Cheshin* [81] 756 (hereinafter: *Herut*)). However, this is not a *presumptio juris et de jure* and the said rule can be rebutted where a legal provision adopts "*explicit and unequivocal language* that leaves no room for doubt" (HCJ 403/71 *Alkourdi v. National Labour Court* [82] 72) (emphasis added); and see: *National Insurance Institute*, 451; HCJ 1260/19 *Kramer v. Ombudsman of Public Complaints against State Representatives* [83], para. 11).

125. In my opinion, the comprehensive, unqualified language of the Amendment is, indeed, "explicit and unequivocal". It lacks any foothold for the suggested narrow interpretation, and leaves "no room for doubt" as to the application of the Amendment to the reasonableness standard in its entirety. In my view, according to its language, there are no grounds for the proposed distinction among various understandings of the reasonableness standard as it has developed in the case law, and in this regard, it was already held in another matter that: "the judge interprets a text created by the legislature, and even realizing a goal, as lofty as it may be, requires an 'Archimedean point' in the language of the law. Deviation from this principle goes to the very root of the matter and is incompatible with the accepted principles of interpretation" (*Polity*, 303; and see: *Zandberg*, 803; AHARON BARAK, INTERPRETATION IN LAW – STATUTORY INTERPRETATION 83 (1993) [Hebrew] (hereinafter: BARAK, STATUTORY INTERPRETATION)).

126. An examination of the linguistic meaning of the term "reasonableness", as it has developed and taken root over the years in the case law of this Court in all that concerns judicial review of the exercise of discretion by an authority, demonstrates that in the absence of express linguistic grounds, it is no longer possible to distinguish among the various senses of the standard. In other words, the term "unreasonableness" means, inter alia, also absurdity. Therefore, abolishing the reasonableness standard in accordance with the distinction established by the Amendment

concerning the identity of the decision maker, necessarily leads to its abolition even in regard to absurd decisions by that group.

As was explained in detail at the beginning of this opinion, the reasonableness standard has been part of our legal system since the earliest days of the state. In the beginning, the standard allowed for the voiding of an administrative decision if it was found to be "absurd", "illogical" or "outrageous", in a manner similar to the English standard established in *Wednesbury* (*Binenbaum*, 385-386; *Dizengoff*, 1039). The broadening of the reasonableness standard is usually ascribed to the judgment in *Dapei Zahav*, although, in fact, this Court had previously voided administrative decisions on the basis of improper balancing of the relevant interests, even if it did so without expressly noting the reasonableness standard (see, e.g.: *Kol Ha'am*; HCJ 243/62 *Israel Film Studios. v. Levi Geri* [84]). The connection between the meaning of the term "reasonableness" as simply absurd and its also applying to a defect in balancing the various relevant considerations was already expressly noted in *Dakka*, which was handed down years before *Dapei Zahav*, and in which Justice Shamgar held that the reasonableness standard could also lead to the voiding of administrative decisions where "the relevant considerations *were granted proportions* so distorted in relation to one another that the final decision became *inherently absurd* and therefore absolutely unreasonable" (*ibid*., 105 (emphasis added)).

127. Thus, we find that *Dapei Zahav* was not created in a vacuum. It relied upon extensive case law of this Court that had developed in accordance with the principles of Common Law and added to the narrow meaning of the unreasonableness standard, which focused upon the absurdity of the decision, a broader test that examined the balance struck by the authority among the various considerations before reaching the decision. This does not mean that absurd decisions no longer fall within the scope of the term "reasonableness". As noted in *Dakka*, giving distorted weight to the various relevant considerations in making an administrative decision may demonstrate its *absurdity* and thus also its *unreasonableness*. This Court has reiterated this point over the course of the last decades in a series of judgments. Thus, for example, *Ganor* noted that "the source of the unreasonableness of the Attorney General's decision is in a material deviation that goes to the very heart of the matter, *to the point that the final decision is inherently absurd and therefore completely unreasonable*" (*ibid*., 523 (emphasis added); and see, inter alia: HCJ 910/86 *Ressler v. Minister of Defense* [85] 503 (hereinafter: *Ressler*); HCJ 581/87 *Zucker v. Minister of the Interior*

[86] 545; *Pinhasi*, 464; HCJ 320/96 *Garman v. Herzliya City Council* [87] 239; HCJ 5331/13 *Tayib v. Attorney General* [88] para. 28, *per* Justice Rubinstein).

128. In accordance with the long-standing principles of administrative law, absurdity is thus rooted in the reasonableness standard, and in the absence of express linguistic grounds, it is not possible to establish an arbitrary interpretive boundary that would break the standard down into it parts and sever the existing relationship among all its meanings.

Therefore, as the Government Respondents and the Chair of the Constitution Committee also emphasized in their arguments, the clear, unequivocal meaning of the language of the Amendment is that it prevents all judicial review of the elected echelon on the basis of the reasonableness standard in all its senses, including absurd decisions.

129. Even if I were to assume, only for the sake of argument, that the language of the Amendment can somehow bear the construction proposed by the Knesset's attorneys, it is hard to ignore the fact that this interpretation clearly contradicts the subjective purpose of the Amendment, as it can be understood from its legislative history and as it is understood by all those involved in its enaction, among them the Knesset Legal Advisor himself. Thus, throughout the legislative process, the legal advisors to the Committee and the Government, as well as jurists and other professionals addressed the problems that inhered in the comprehensive, unqualified language of the proposed amendment, which entirely rules out judicial review on the basis of the reasonableness standard without distinguishing among its various meanings or among different types of decisions of the elected echelon. This position was already expressed, inter alia, in the Preparatory Document of June 23, 2023, in which the Committee's legal advisor pointed out to the Committee that the proposed amendment does not abolish the reasonableness standard only in its sense in *Dapei Zahav*, but categorically abolishes its use, even in the narrow sense of "absurdity" (p. 8 of the Preparatory Document).

130. Although the Explanatory Notes of the Amendment Bill, as presented for the first reading on July 5, 2023, included a quote from *Dapei Zahav* in order to describe the reasonableness standard today, and noted that it has been argued in regard to the reasonableness standard in this sense that "establishing a value-based balance among the various considerations related to an administrative decision should be given to the public's elected representatives and not to the court".

However, the Committee's legal advisor, Advocate Blay, again explained even after the publication of the Explanatory Notes, that the wording of the Amendment "does not leave a standard of extreme unreasonableness in the sense of absurdity in regard to elected officials" (Transcript of meeting 121, p. 11). In other words, in the opinion of the Committee's legal advisor, who composed the Explanatory Notes (see: the clarification by MK Rothman and the Knesset's attorney in the hearing before us, pp. 38, 193-194 of the Transcript of the hearing on Sept. 12, 2023); para. 6(d) for the Knesset's Supplemental Brief), the mention of *Dapei Zahav* in the Explanatory Notes does not mean that the Amendment was intended to apply to the reasonableness standard only in the sense addressed there. A similar view was expressed by the Deputy Attorney General, Advocate Limon, who was of the opinion that we are concerned with a most extreme proposal that "entirely annuls the Supreme Court's case law on the subject of reasonableness, not only the judgment in *Dapei Zahav* […] but from the earliest days of the state" (Transcript of meeting 121, p. 33). The members of the Committee also addressed the problem inherent in the proposed amendment that, in effect, comprehensively abolishes the reasonableness standard in all its senses. Thus, for example, MK Gilad Kariv argued that the Amendment Bill "grants immunity even to extreme unreasonableness or absurdly unreasonable decisions by the political echelon. You are not proposing a return to the situation prior to *Dapei Zahav*" (Transcript of meeting 105, p. 100; and see the position of MK Orit Farkash-Cohen in the Transcript of meeting 126 of the Constitution Committee, the 25th Knesset, 94 (July 16, 2023) (hereinafter: Transcript of meeting 126).

131. Against the above background, various alternatives were proposed in the Committee's meetings for softening the comprehensive language of the Amendment. However, these proposals were expressly rejected by the Chair of the Committee and the coalition's representatives on the Committee. The Chair of the Committee, MK Rothman, who initiated the Amendment, noted that there is no way "to draw the line" between the various meanings of the reasonableness standard and that adopting the proposed distinctions would lead to a blurring of its standard's boundaries by the Court and would effectively empty the Amendment of meaning (Transcript of meeting 105, p. 113; Transcript of meeting 125, p. 15). Therefore, MK Rothman was of the opinion that there is no alternative to the comprehensive abolition of the reasonableness standard in regard to all decisions of the elected echelon, and in all the senses of the standard. In the course of presenting

the Amendment Bill to the Knesset for a second and third reading, MK Rothman added in this regard:

> Others proposed to return to the *unreasonableness standard of Wednesbury*, but this solution, as many have noted, *does not prove itself*, since Justice Barak himself in the *Dapei Zahav* judgment claimed that he was relying upon the extreme unreasonableness standard. […]
>
> Therefore, it is proposed to establish in Basic Law: The Judiciary […] that a judicial authority will not be able to address the matter of the reasonableness of the Government in a plenary session […] of the Prime Minister, or of another minister, or issue an order against any of them in regard to the reasonableness of its decision, *whether by virtue of the original reasonableness standard or whether by virtue of the new reasonableness standard, and that also in regard to appointments and decisions not to exercise authority* […] as far as I am concerned, and I believe that I am speaking on behalf of the members of the coalition of course, these [things] reflect the principles and foundations grounding this bill (Transcript of session 97 of the 25th Knesset, 551-552 (July 23, 2023) (emphasis added).

132. Thus, tracing the legislative history of the Amendment shows that the Amendment's silence in regard to the term "reasonableness" is not a "legislative mishap" or the result of not taking a stand on the issue, which needs to be remedied through interpretation (see and compare: CA 108/59 CA 108/59 *Pritzker v. Niv* [89] 1549; *Herut*, 759). On the contrary, the comprehensive language of the Amendment was the result of a *conscious* choice of the drafter who sought to prohibit the use of the reasonableness standard in regard to all decisions at the elected echelon and in regard to every sense of the standard. Under these circumstances, interpretation that seeks to narrow the scope of the Amendment only to the reasonableness standard in its sense in *Dapei Zahav* is not only incompatible with the language of the provision, but also clearly contrary to the subjective, declared purpose of the Amendment.

133. Actually, even the Knesset's attorney emphasized that "from the language of the amended Basic Law, it would appear that the amended Basic Law applies to reasonableness in all its aspects,

without distinguishing between the traditional reasonableness standard and the new reasonableness standard" (para. 14 of the Knesset's Supplemental Brief). He also does not dispute that the subjective purpose leads to the same conclusion. However, according to his approach, the Basic Law should not be interpreted on the basis of those tests, and that primacy should be given to the principle that "narrow interpretation of a law should be preferred to its being voided" (*ibid*.).

134. Indeed, according to the doctrine of purposive interpretation employed in our system, the subjective purpose is only one element of interpretation, and as a rule, it should not be given decisive weight over the objective purpose, which treats of the values and principles that a legislative act is intended to realize in a modern democratic society (BARAK, STATUTORY INTERPRETATION, 202; *Anti-Corruption Movement*, para. 62, *per* Deputy President Vogelman; HCJFH 5026/16 *Gini v. Chief Rabbinate* [90] paras. 24-25, *per* President Naor). However, while there is no doubt about the existence of important objective purposes that will be realized if the Amendment is subjected to narrow interpretation, I do not believe that, under the circumstances, they can be granted primacy over the express language of the Amendment and its declared subjective purpose.

135. In my opinion, this conclusion derives from the inherent limitations upon interpretation. Thus, the fundamental principle in our system states that we are obligated to seek out an interpretive solution that will avoid the need to decide upon the validity of a piece of legislation (see, among many: HCJ 3267/97 *Rubinstein v. Minister of Defense* [91] 524 (hereinafter: *Rubinstein*); HCJ 5113/12 *Friedman v. Knesset* [92] para. 5, *per* Justice Arbel; *Anti-Corruption Movement*, para. 31*, per* Deputy President Vogelman). However, at times, the Court is forced to decide that no such interpretation is possible. This is particularly the case when such an interpretation is artificial and leads to emptying the legal arrangement of all content or leads, in practice, to rewriting the law (see: HCJ 7146/12 *Adam v. Knesset* [93] 848; HCJ 7385/*13 Eitan - Israeli Immigration Policy Center v. Government* [94] para. 200, *per* Justice Vogelman (hereinafter: *Eitan*); *Arad Pinkas*, para. 21 of my opinion; and see my comment in this regard in HCJ 5469/20 *National Responsibility - Israel My Home v. Government of Israel* [95] para. 39 of my opinion).

Such is the case before us. In my opinion, an interpretation that would narrowly construe the application of the amendment that abolishes the reasonableness standard in regard to the elected echelon only in its sense in *Dapei Zahav* would be a dubious interpretation that would effectively constitute a redrafting of the Amendment by the Court in a sense that would be completely different from that of the existing Amendment. This is all the more so because we are concerned with interpretation that touches upon the *core* of the constitutional arrangement and not its ancillary aspects, such as the time of its entry into force (see, e.g., *Ganis*, 258; *Anti-Corruption Movement*, paras. 33-34, *per* Deputy President Vogelman).

136. For all the above reasons, I do not believe that we can adopt the distinction among the various meanings of the reasonableness standard proposed by the Knesset in regard to the application of the Amendment by means of interpretation. My conclusion is, therefore, that the Amendment should be interpreted in accordance with its plain meaning, i.e. – as a provision that comprehensively abolishes judicial review on the basis of the reasonableness standard, in all its senses, as regards decisions by the Government, the Prime Minister, and the ministers.

D.2. The language of the Amendment – extreme and exceptional

137. Before addressing the significance and consequences of the amendment that is the subject of the petitions. I would like to dwell upon the language of the Amendment and point out five different aspects that testify to how *extreme* and *exceptional* it is:

First, as explained above, the Amendment relates to all the senses of the reasonableness standard, and therefore prevents intervention even in absurd, patently unreasonable governmental decisions as long as they so not comprise any other administrative defect.

Second, the Amendment applies to every court, and in effect to any "holder of judicial authority under law", including the High Court of Justice that is granted general authority to grant "relief for the sake of justice" in accordance with sec. 15 (c) of Basic Law: The Judiciary. The fact that the Amendment *explicitly* abolishes even the jurisdiction of the Hight Court of Justice in this regard testifies to its extremeness in comparison to other provisions that limited recourse to the

courts but that were interpreted as leaving the possibility, in principle, of filing a petition to the High Court of Justice (see, among many examples: HCJ 76/63 *Trudler v. Election Officers* [96] 2511-2512; HCJ 68/07 *Robinson v. State of Israel* [97] para. 3).

Third, the Amendment not only prevents granting relief by virtue of the reasonableness standard in regard to the elected echelon ("will not issue an order"), but also prevents the very addressing of the question of the reasonableness of those decisions ("shall not address"). In other words, following the Amendment, a person who is directly harmed by a decision of a minister due to unreasonableness will not be able to bring that matter before the Court.

Fourth, the Amendment applies to every decision, as long as it was made by the Government, the Prime Minister, or a Government Minister. To remove all doubt, the end of the section clarifies ("'decision' means any decision, […]"). The case law and legal literature have noted more than once in regard to the reasonableness standard that the judicial review derives from the type of decision made and from the nature of the authority exercised (HCJ 2533/97 *Movement for Quality Government v. Government* [98] 57-58; HCJ 1163/98 *Sadot v. Prisons Service* [99] 846; BARAK-EREZ, ADMINISTRATIVE LAW, 762-757; RUBINSTEIN & MEDINA, 223). It has been held in this context in regard to decisions by the Government or any of its members that "the bounds of the 'range of reasonableness' […] widen or narrow depending on the type of the power exercised" (*Hanegbi 2003*, 841). Nevertheless, the Amendment applies comprehensively to *all decisions*, without exception. The Amendment does not distinguish between Government decisions that establish broad policy and "individual" decisions that are made on a daily basis and directly affect the personal matters of a particular person of body. Likewise, the Amendment does not distinguish between decisions made by the Government by virtue of the Knesset's confidence and decisions made by a transition government. It even does not distinguish between areas in which there is a sufficient legal response by means of other standards of review and areas in which the reasonableness standard is, in effect, the only standard by which a remedy can be obtained from the Court, as shall be addressed in detail below.

Fifth, the Amendment also prevents intervention in a "decision to refrain from exercising authority". The Knesset, on its part, emphasized that the Amendment does not apply to situations in which an authority refrains from making a decision unless a *positive decision* was made not to

exercise authority (para. 22 of its Supplemental Brief). I accept this interpretation, but even this clarification leaves the door open for the Government and its members to knowingly shirk exercising a particular authority, and prevents the Court from granting a remedy for omissions that severely harm an individual or the entire public.

138. The Knesset, the Committee Chair, and the Government argued that the Amendment relies upon the principled distinction presented by my colleague Justice Sohlberg in his academic writing between decisions of the elected and the professional echelons. As I understand it – although Justice Sohlberg criticized certain trends in the Court's decisions – he did not propose completely and comprehensively restricting the use of the reasonableness standard, and certainly not by means of *enacting a Basic Law*. However, the Amendment, by the extreme language adopted, does not leave the Court any flexibility and discretion in this regard: it deprives every court of the very possibility to consider and hear arguments upon the subject, it entirely abolishes the reasonableness standard in regard to the elected echelon and in regard to every decision, including a decision to refrain from exercising authority.

139. In the course of the Committee's debates, and in the framework of the Committee's legal advisors attempts to "soften" the Amendment's extreme language, the Preparatory Document of June 23, 2023 had already suggested considering an alternative model by which the restriction of the reasonableness standard would apply "in regard to all the decisions made by the elected echelon, *but only in regard to a certain type of decisions*" (p. 12 of the Preparatory Document – emphasis original). In the meeting of June 25, 2023, the Committee's legal advisor, Advocate Gur Blay, again proposed "to focus the restriction [on the use of the reasonableness standard] to certain decisions of the elected echelon" and explained that the significance of the Amendment's comprehensive language is the elimination of judicial review of administrative decisions "even in extreme situations […] in which it was possible to intervene even under the old *Wednesbury* rule" (Transcript of meeting 105, pp. 86, 106). Two days later, Advocate Blay emphasized the need "to make an exception for every decision that directly affects an individual, whether it is what the literature refers to as an individual right or an individual interest" (Transcript of meeting 109 of the Constitution Committee of the 25th Knesset, 45 (June 27, 2023) (hereinafter: Transcript of meeting 109)). After the Amendment Bill was approved in a first reading, Advocate Blay again insisted that the Amendment was more sweeping than every other course of action considered in

regard to the reasonableness standard, and noted three primary areas in which no effective judicial review would remain following the Amendment: decisions by a transition government, decisions in regard to appointments and dismissals, and individual decisions that involve a violation of protected rights (Transcript of meeting 121, pp. 11-13).

Despite all of these remarks and proposals, the Amendment Bill remained virtually as is, and the main change introduced before its approval in a second and third reading even exacerbated the existing wording by clarifying that "decision" means "any decision, including in matters of appointments, or a decision to refrain from exercising authority".

140. As will be explained below, the extreme, extraordinary wording of the Amendment, and given the present constitutional reality, inflicted harm of *unprecedented scope* upon two of the core characteristics of our democratic system – the principle of separation of powers and the principle of the rule of law.

D.3. Infringement of the separation of powers

141. The idea at the base of the principle of separation of powers is the division of power and the distribution of authority among the branches of government – "the legislature should exercise legislative power; the executive should exercise executive power; the judiciary should exercise judicial power" (HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [100] 55 (hereinafter: *Supreme Monitoring Committee*)). However, this is but one element of the principle of separation of powers. It is now clear to all that the separation of powers in a democratic state also means *mutual oversight* among the branches such that each checks and balances the others (*ibid*.; and see: HCJ 5364/94 *Wilner v. Chair of the Israel Labor Party* [101] 783; and see: HCJ 306/81 *Sharon v. Knesset House Committee* [102] 141; RUBINSTEIN & MEDINA, 127-128). As noted in the case law: "This delicate and complex formula of the decentralization of power and mutual supervision is what empowers the three branches of government and determines the relations among them. This is what creates and preserves the rule of law and democracy, *and undermining this is likely to endanger the whole system of government*" (*Supreme Monitoring Committee*, 55; emphasis added).

It is important to emphasize that the primary purpose of the principle of separation of powers does not focus on the branches themselves or the propriety of the relationship among them. The separation of powers is intended to "prevent the concentration of power in one governmental authority in a manner liable to violate individual freedom" (*Rubinstein*, 512; on the historical sources of the principle of separation of powers, see: DISTRIBUTION OF POWER, 24-13). It is, indeed, a principle that entirely rests upon the *protecting of the individual from the government*.

142. Given the great power concentrated in the executive branch in general, and the Government in particular, in the Israeli system, judicial review constitutes an oversight mechanism whose importance in ensuring the protection of the rights of the individual against their violation by the government cannot be overstated. It has already been held in this regard that "the absence of judicial supervision will end in the violation of human liberty" (LCrimA 2060/97 *Valinchik v. Tel Aviv District Psychiatrist* [103] 713).

In the present case, we should emphasize that "according to the approach of administrative law in recent generations, the ground of reasonableness acts as a main and essential instrument of judicial review of the administration, and it stands at the forefront of the protection of the individual and the public against arbitrary government" (*Emunah*, 486). As will be explained below, Amendment no. 3 to Basic Law: The Judiciary leads to an even greater concentration of governmental power in the hands of the elected echelon and to situations in which the individual will be left without protection against severe harm by the Government or by one of its ministers because recourse to the Court has been blocked.

143. It can be inferred from the Explanatory Notes of the Amendment Bill that it was based upon the concept that decisions by the elected echelon generally treat of setting policy principles that reflect the worldview upon which the members of the Government were elected, and therefore "balancing the values of the various considerations in regard to the administrative decision must be granted to the public's elected representatives and not to the court" (p. 110 of the Amendment Bill). However, as was made clear in the course of the Committee's debates, the decisions of the Government and its ministers do not merely comprise a theoretical balance of values. They directly influence the lives of specific people, and at times, involve their severe harm (see, inter alia, Transcript of meeting 105, pp. 116-117; Transcript of meeting 121, pp. 12-13, 15-16).

144. Many of the powers that the law grants to government ministers concern individual matters that directly affect a particular person or entity. In this regard, we might note, as a very partial, non-comprehensive list, the following powers:

A. The power of the Minister of the Interior *to grant or invalidate a residence permit and to prevent the granting of an immigration visa* (Citizenship Law, 5712-1952; Entry into Israel Law, 5712-1952; sec, 2(b) of the Law of Return).

B. The power to *grant or revoke licenses, concessions, and permits* (see, e.g., sec. 41 of the Physicians Ordinance [New Version], 5737-1976; sec. 19 of the Veterinarian Doctors Law, 5751-1991; sec. 10A of the Natural Gas Sector Law, 5762-2002; sec. 4(b2) of the Electricity Sector Law, 5756-1996; various powers under the Communications (Telecommunications and Broadcasting) Law, 5742-1982; secs. 11(a) and 11b(a) of the Engineers and Architects Law, 5718-1958; sec. 3 of the Meat and Meat Products Law, 5754-1994; secs. 2-3 of the Explosives Law, 5714-1954; sec. 4A(a) of the Seeds Law, 5716-1956).

C. Powers concerning the *taking of land for public purposes, compensation for harmful plans, and granting an exemption from improvement assessments* (sec. 3 of the Lands (Acquisition for Public Purposes) Ordinance, 1943; secs. 189(b), 190(1)(2), 197(b) and sec. 19(b) of the Third Schedule of the Building and Planning Law, 5725-1965 (hereinafter: the Building and Planning Law)).

D. Powers concerning *criminal proceedings* (sec. 18 of the Extradition Law, 5714-1954; secs. 7-8 and 13 of the Serving a Prison Sentence in the State of Nationality Law, 5757-1996., 5757-1996. And see sec. 12 of Basic Law: The President and HCJFH 219/09 *Minister of Justice v. Zohar* [104] concerning the Minister of Justice's countersignature on pardons).

E. Powers concerning *workers' rights* (secs. 9D1 and 12 of the Hours of Work and Rest Law, 5711-1951; secs 1 and 9 of the Employment of Women Law, 5714-1954; sec. 28 of the Severance Pay Law, 5723-1963; sec. 2(c) of the Youth Labor Law, 5713-1953; sec 1E(c)(1) of the Foreign Workers Law, 5751-1991).

F. Powers concerning matters of *family, personal status, and inheritance* (see, e.g.: sec. 28P of the Adoption of Children Law, 5741-1981; sec. 16 of the Names Law, 5716-1956; sec. 17(b) of the Inheritance Law, 5725-1965).

In some cases, the said powers have been delegated by the minister to other bodies, but as we know, such a delegation can be revoked at any time (see: BARAK-EREZ, ADMINISTRATIVE LAW, 187-188 and references there), while the power – under the enabling law – is in the hands of the minister.

145. Not infrequently, the Court is called upon to protect the important rights and interests of individuals as a result of decisions by the elected echelon that were tainted by extreme unreasonableness and expressed a distorted balance of the various, relevant considerations. So it was, for example, when the Minister of Defense refused a request by bereft families to change the wording on a monument dedicated to their loved ones (HCJ 6069/00 *Association for Perpetuating the Memory of the Victims of the Helicopter Disaster in She'ar Yishuv v. Minister of Defense* [105]; when the Minister of the Interior refused to grant status to the daughter of an Israeli citizen who was raised and educated in Israel, regarding whom it was decided to grant permanent status in the past, but who was never informed of that decision (*Bautista*); and also see: HCJ 3840/13 *Anonymous v. Minister of the Interior* [106]; and when decisions by ministers significantly harmed the economic interests of individuals (see, e.g.: HCJ 176/90 *Machnes v. Minister of Labor and Welfare* [107] 730; HCJ 1829/93 *Nazareth Transportation and Tourism Co. v. Minister of Finance* [108]; HCJ 5946/03 *Keshet Prima v. Supervisor of Prices* [109]). In one case in which it was decided to deprive a person of his being awarded the Israel Prize for non-professional reasons, it was even held that the minister's decision was so unreasonable that it did not even meet the "narrow" reasonableness standard, as the decision was irrational (HCJ 8076/21 *Selection Committee for the 1981 Israel Prize Computer Science Research v. Minister of Education* [110] para. 52, *per* Justice Y. Wilner); and compare to the case of an unreasonable decision to refrain from appointing a person found suitable by the relevant professionals: HCJ 8134/11 *Asher v. Minister of Finance* [111] para. 20, *per* Deputy President Rivlin).

146. Even broad decisions that can be viewed as decisions concerning policy principles may lead to very severe harm to individuals, specifically because of the importance of the areas for

which the Government and its members are responsible. The clear example is *Wasser*, in which the Court intervened in a Government decision to only partially protect the educational institutions in the "Gaza perimeter", holding that in view of the real, concrete threat, the balance struck "between the professional-security considerations and the budgetary considerations significantly departs from the margin of reasonableness" (*ibid*., 215). A recent example of this is *Zilber*, in which the Court held that the new policy of the Minister of Finance and the Minister of the Economy and Industry for changing the criteria for support for the subsidizing of daycare centers for the families of yeshiva students comprised a short transition clause that was unreasonable in the extreme (see and compare: HCJ 5290/97 *Ezra – National Hareidi Youth Movement v. Minister of Religious Affairs* [112] 430).

147. We would emphasize that – contrary to the claims made in the course of enacting the Amendment and by some of the Respondents in these proceedings – the other administrative law standards for review do not provide an effective alternative to the reasonableness standard. Therefore, in many of the cases cited above and in additional cases, it would not have been possible to grant a remedy to the petitioners without the reasonableness standard, and they would have found themselves in a hopeless situation.

148. One of the central arguments raised in the Committee's debates, and that was raised by some of the Respondents in this regard, is that the proportionality standard in any case serves as a standard for judicial review of decisions that violate basic rights, and therefore the harm caused by the abolition of the reasonableness standard in regard to decisions by the elected echelon is not dramatic (see: the statement of MK Rothman in the Transcript of meeting 105, p. 77, and the Transcript of meeting 113 of the Constitution Committee of the 25th Knesset, 55 (July 3, 2023); para. 332 of the Knesset's Affidavit in Response; para. 245 of the Government Respondents' Affidavit in Response).

Over the years, our system developed and formed the proportionality standard primarily against the background of its express inclusion in Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, and it is now viewed in the case law as an important standard for providing protection in cases of the violation of individual rights (see, among many: HCJ 2651/09 *Association for Civil Rights in Israel v. Minister of the Interior* [113], para. 19, *per* Justice

Danziger; HCJ 79/17 *Ziada v. Commander of the IDF Forces in the West Bank* [114], para. 73, *per* Deputy President (emer.) Joubran; and see: HCJ 11437/05 *Kav LaOved v. Minister of the Interior* [115] 190-193; BARAK-EREZ, ADMINISTRATIVE LAW, 784-785). However, as the examples presented above demonstrate, sometimes an individual suffers significant harm as the result of a governmental decision even when it is not possible to identify a direct violation of a right (in this regard, also see the statement of Advocate Blay in the Transcript of meeting 109, pp. 41-42, and the Transcript of meeting 120 of the Constitution Committee of the 25th Knesset, 76 (July 7, 2023) (hereinafter: Transcript of meeting 120)). This is so, for example, when we are concerned with a flawed balance between budgetary considerations and public security considerations, or when the harmed interests are economic and social interests that are not vested rights, like subsidies, social services, licenses, appointments, prizes and matters of status. In such cases, the reasonableness standard may be the only effective legal tool for protecting the individual (see and compare other instances in which this standard served for intervention in the decisions of other authorities: *Sela*, in which a local council refrained from allocating land for the building of a *mikveh* and did not give proper weight to the harm to the religiously observant women in the community; HCJ 4988/19 *Rosenzweig Moissa v. Public Utilities Electricity Authority* [116] in which an order absolute was granted, finding that the list of consumers for whom the supply of electricity is vital and cannot be suspended for a debt was "limited in a manner that deviated from the margin of reasonableness").

149. This is also the case in regard to the standard of extraneous considerations. This, too, does not constitute an effective alternative to the reasonableness standard. A person claiming the existence of extraneous considerations in an authority's decision must present an evidentiary foundation for his claim. That is a very significant burden given the fact that he is required to expose the improper motives of the authority or show circumstantial indicators of real weight that testify to such motives (see: HCJ 4500/07 *Yachimovich v. Council of the Second Authority for Radio and Television* [117] para. 12; HCJ 8756/07 *"Mavoi Satum" Association v. Committee for the Appointment of Rabbinical Court Judges* [118] para. 43; BARAK-EREZ, ADMINISTRATIVE LAW, 669-672). Due to the substantial evidentiary problems in this regard, a significant part of petitions based upon the claim of extraneous considerations are dismissed for lack of a factual foundation (*ibid*., 670). In addition, the extraneous considerations standard does not address the issue of a flaw in the balance struck by the authority among valid considerations (see: AAA 343/09 *Jerusalem*

Open House for Gay Pride v. Jerusalem Municipality [119]), which is also a reason why this standard does not serve as an alternative to examining the reasonableness of a decision.

150. Another standard mentioned in the Committee's debates and in the arguments presented by the parties to these proceedings is that of arbitrariness (see, e.g.: Transcript of meeting 126, pp. 50 and 57; para. 316(a) of the Knesset's Affidavit in Response). Even if I assume that we are concerned with a standard that is distinct from that of reasonableness and not one of the levels of reasonableness like "absurdity" (see various approaches in this regard in ZAMIR, ADMINISTRATIVE POWER, 3525-3537; BARAK-EREZ. ADMINISTRATIVE LAW, 724; and see: Transcript of meeting 126, p. 127) – arbitrariness, by its nature, concerns rare and extreme government conduct. Thus, the case law and the literature have referred to an arbitrary decision as one made "on the basis of just a feeling" or "disconnected from the facts of the case" and even "a type of corruption" (HCJ 986/05 *Peled v. Tel-Aviv Yafo Municipality* [120] para. 14; ZAMIR, ADMINISTRATIVE POWER, 3446-3447; and see: AAA 1930/22 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality* [121] para. 39, *per* Justice Groskopf; LCrimA 1611/16 *State of Israel v. Vardi* [122] paras. 70-72, *per* Deputy President Melcer; HCJ 376/81 *Lugasi v. Minister of Communications* [123] 460). A distinct standard based on each of these definitions cannot serve as a real alternative to examining the unreasonableness of decisions, inasmuch as these definitions are directed at edge cases in which it would appear that no discretion was exercised prior to making the decision.

151. In practice, reasonableness is often a substitute for the other standards of review, and preventing the possibility of its use severely harms the individual in this regard as well. On more than one occasion, the case law has noted the role of the reasonableness standard as a kind of "valve concept" that can serve as an important tool for identifying administrative decisions suffering such severe defects as extraneous considerations, when there is an evidentiary problem in proving them (*Hanegbi*, 2014, para. 2, *per* President Naor; *Netanyahu*, para. 5, *per* Justice Barak-Erez; and see: BARAK-EREZ, ADMINISTRATIVE LAW, 726). In this regard, it was held that "in this residual form, the reasonableness doctrine yields great social benefit: it provides the courts with an effective, necessary tool for judicial review under uncertainty, and does not allow government authorities to hide their failures by exploiting the ambiguity of the factual foundation" (*Scheinfeld*, para. 35, *per* Justice Stein). In such circumstances, as Professor Itzhak Zamir noted well, "it would not be fair to deprive the petitioner the last resort of the reasonableness standard,

which is, at times, the only grounds by which he may achieve justice through the courts and preserve the lawfulness of the administration" (ZAMIR, ADMINISTRATIVE POWER, 3607).

152. As we see, in the existing legal situation, the other grounds for review cannot compensate for the broad harm to the individual if a series of decisions made by the elected echelon on a daily basis will be immune to review on the basis of reasonableness. In this regard, it was noted in *Emunah* that:

> Restricting the ground of reasonableness may create a vacuum in judicial review that may not be filled by other grounds of review and may seriously curtail the willingness of the court to intervene in cases where the administrative authority did not consider all and only the relevant considerations in its decision or considered them but did not give them their proper relative weight, or also considered irrelevant considerations. It is easy to imagine the damage that such a process can be expected to cause to the concept of the legality of administrative action and the purpose of protecting the citizen in his relationship with the government, which lies at the heart of the definition of the grounds of judicial review of administrative action (*ibid*., 487).

153. The Knesset argues that over the course of time it will be possible to contend with the consequences of the Amendment through the use of judicial tools by developing new standards or by changing the way that the existing standards for review are implemented. However, this speculative assumption does not provide a response to the distress of individuals already being harmed by unreasonable administrative decisions who cannot wait years for substantive changes that may or may not be made in administrative law.

The possibility of replacing judicial review of unreasonable decisions with public or parliamentary oversight, a possibility raised by the Knesset and the Government Respondents (see: paras. 318-319 of the Knesset's Affidavit in Response; para. 265 of the Government Respondents' Affidavit in Response) also provides no response to the serious harm to the individual that is caused by the Amendment. On the institutional level, the Knesset and its committees are not able – nor intended – to carry out continuous, effective oversight of the thousands of decisions made by the

Government and the ministers every year, many of which are of an individual nature (this was pointed out by the legal advisor to the Committee on p. 11 of the Preparatory Document of June 23, 2023; on the limited oversight capability of the Knesset, see: CHEN FRIEDBERG & REUVEN HAZAN, LEGISLATIVE OVERSIGHT OF THE EXECUTIVE BRANCH IN ISRAEL: CURRENT STATUS AND PROPOSED REFORM (Policy Paper 77, Israel Democracy Institute, 2009) [Hebrew]). The resolution of conflicts between the citizen and the government in a democracy is carried out in court (see: HCJ 287/69 *Meiron v. Minister of Labor* [124] 362). Parliamentary oversight mechanisms focus upon "procedures of establishing general policy by the Government and [supervision] of them", and not upon specific instances that come to the courts as a matter of course (DOTAN, JUDICIAL REVIEW, 82-83). This is the case even without addressing the inherent problem that there is a coalition majority in the Knesset and its committees whose ability to serve as an effective check upon the Government's activities is doubtful, to put it mildly (see and compare: *ibid*., 85).

154. There is also no substance to the argument by the Government Respondents that the Amendment only establishes "a norm [that is] accepted in the overwhelming majority of western democratic states" in regard to the applicability of the reasonableness standard (para. 258 of their Affidavit in Response). First, as already noted, the consequences of the Amendment must be examined against the background of the specific constitutional context in which it was adopted. It is clear that in a system in which the Government controls the legislative branch, and judicial review is the only effective mechanism that serves as a check upon its actions, significantly limiting the reasonableness standard inflicts far more severe and significant harm to the separation of powers that the harm that might be caused as a result of a similar amendment in systems that are equipped with a range of mechanisms of checks and balances.

Moreover, the argument itself is imprecise. The global trend over the last decades is one of expanding the application of the reasonableness standard and others like it for the review of administrative discretion, and not their reduction (for details, see the Preparatory Document of June 23, 2023, p. 6; and see: BARAK-EREZ, ADMINISTRATIVE LAW, 724). A salient example of this can be found in Great Britain where the narrow *Wednesbury* principle was first developed. Today, the British system applies a more expansive approach to the reasonableness standard (see: Cohn, "Comparative Aspects", 782-790; HARRY WOOLF ET AL., DE SMITH'S JUDICIAL REVIEW, para. 11-099 (8th ed., 1018), and recent judgments have also explained that, as in the Israeli approach, the

reasonableness standard also comprises a "balancing" aspect (see: *ibid*., para. 11-030; *Kennedy v The Charity Commission* [158] para. 54; Adam Perry, "Wednesbury Unreasonableness," 82 CAMBRIDGE L.J. 483, 486 (2023)). Moreover, the British courts also examine the reasonableness of the decisions of ministers, while granting weight to their being elected officials (H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 318 (10th ed., 2009); *Padfield v Minister of Agriculture, Fisheries and Food* [159]; and see: ZAMIR, ADMINISTRATIVE POWER, 3870-3871).

In addition, over the last decade, the Supreme Courts of Australia and Canada comprehensively debated the reasonableness standard, in the course of which they grounded it as a central standard of review in administrative law. In Australia, the Supreme Court extended the criterion to the unreasonableness of decisions, while holding that the narrow test associated with *Wednesbury* should be abandoned and preference should be given to a more in-depth test (*Minister for Immigration & Citizenship v Li* [163]; the reasonableness test is even anchored in law in Australia: Administrative Decisions (Judicial Review) Act 1977, s. 5(2)(g)). In Canada, the Supreme Court comprehensively arranged the grounds for administrative review and strengthened the place and role of reasonableness as opposed to a *de-novo* review of the administrative decision, which would be undertaken only in exceptional cases (*Canada (Minister of Citizenship and Immigration) v. Vavilov* [164] 4 S.C.R. 653 (hereinafter: *Vavilov*); PAUL DALY & COLEEN FLOOD, ADMINISTRATIVE LAW IN CONTEXT 351 (2021). The judgment made it clear that the reasonableness standard also applies to decisions made by ministers and to policy decisions (*Vavilov*, paras. 88-89). The literature has even noted that, in certain senses, judicial review of the decisions of ministers and other elected officials has become more strict since *Vavilov* (Paul Daly, "Vavilov and the Culture of Justification in Contemporary Administrative Law," 100 SUP. CT. REV. 279, 303-304 (2021)).

It should be further noted that although the reasonableness standard is not a primary ground in Continental law, in practice, even those legal systems carry out judicial review of administrative discretion on the basis of test that are materially similar, and they are often more strict in regard to the administrative authorities in comparison to those employed in the Common Law (Ron Shapira, "On the Reasonableness of Reasonableness," The Israel Law & Liberty Forum Blog 1, 2 (Jan. 16, 2023) [Hebrew]; Itzhak Zamir, "Israeli Administrative Law in comparison to German Administrative Law," 2 MISHPAT UMINHAL 109, 129-130 (1994) [Hebrew]; and see: JOHN BELL &

FRANÇOIS LICHÈRE, CONTEMPORARY FRENCH ADMINISTRATIVE LAW 191-195 (2002); MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 165-166 (2001)).

155. The comparative survey only serves to illustrate the material difficulties raised by the Amendment. In other legal systems, the trend is to expand the use of the reasonableness standard, inter alia, against the background of the growing power of the executive branch in the modern state and the need to oversee its discretion (see and compare: YOAV DOTAN, ADMINISTRATIVE GUIDELINES 510-511 (1996) [Hebrew]). As opposed to that, In Israel – where, in comparative terms, the Government concentrates unprecedented power in its hands – the constituent authority chose to bar the possibility for examining the reasonableness of the decisions of the Government, the Prime Minister and the ministers in a sweeping, extreme and exceptional manner.

156. The immediate significance of the Amendment – which absolutely denies an individual any possibility of raising arguments in regard to the reasonableness of decisions by the Government, the Prime Minister and the ministers, and the possibility of obtaining relief on the basis of such arguments – is a mortal blow to the right of access to the courts "whose existence is a necessary, vital condition for the existence of all the other basic rights" (*Arpal*, 629).

The Government Respondents argue that our matter does not involve any violation of the right of access to the courts, inasmuch as that right concerns the possibility of obtaining relief in accordance with the law and the law has changed in this matter (para. 266 of their Affidavit in Response). This argument cannot be accepted. While the Amendment abolished the *reasonableness standard* as a ground for judicial review of the elected echelon, it does not free the Government and its members from the *duty of reasonableness*. In accordance with that duty, they must exercise discretion properly, while giving appropriate weight to all the relevant considerations. This is the case because every administrative authority exercises its powers as a public trustee (see: *Eisenberg*, 258-259; HCJ 5657/09 *Movement for Quality Government v. Prime Minister* [125] para. 39 (hereinafter: *Djerbi*)). In the course of the debates in the Constitution Committee, the Committee Chair, MK Rothman, the initiator of the Amendment, explained that this duty continues to hold in regard to the Government and the ministers (Transcript of meeting 121, 24-35). A similar position was presented in the proceedings before us in the Knesset's arguments (para. 301 of the Knesset's Affidavit in Response). Therefore, while the law applicable

to the Government, the Prime Minister, and the ministers in this regard remains unchanged – the individual has been deprived of protection from governmental power, as he can no longer obtain relief for a violation of law, even if it is a severe violation of his important interests.

157. In *Arpal*, it was noted that "barring the path to the court – whether directly or indirectly – and even only partially" harms "the democratic foundation of the state" (*ibid*., 629). This conclusion derives from the *a priori* purpose at the base of the principle of separation of powers – preventing the concentration of too much power in the hands of the regime and preventing the threat that would result to individuals in the state. The Amendment that is the subject of the petitions and the abolition of the reasonableness standard in all that relates to the elected echelon deprives the Court of a central oversight tool and grants significant, additional, and unlimited governance power to the Government, which already holds unprecedented power.

Therefore, there is no alternative but to conclude that the Amendment strikes an extremely severe blow to the principle of separation of powers, which is one of the core characteristics of the State of Israel as a democratic state.

D.4. The harm to the rule of law

158. The basic meaning of the principle of the rule of law in a democratic state is that "no person or body is above the law" (HCJ 1843/93 *Pinhasi v. Knesset* [126] 682). This principle does not only apply to individuals in the state: "all government authorities, including the Government itself, are subject to the law. No authority is above the law" (*Eisenberg*, 274). Judicial review of administrative actions has long served as a most central tool in defending the rule of law, and ensuring that the government acts *lawfully* is a core role of the court in a democratic society (see: Ressler, 462; DOTAN, JUDICIAL REVIEW, 70; RUBINSTEIN & MEDINA, 174).

The law means the written law and the case law, including administrative law as developed in the case law over the years (AAA 867/11 *Tel-Aviv Yaffo Municipality v. A.B.C. Management and Maintenance, Ltd*. [127] para. 28, *per* Justice Vogelman). The reasonableness standard is among the principles of administrative law, and it has been stated in regard to its application to all the administrative authorities as follows:

> Like every decision by an administrative body, the decisions of the Government, its ministers and the Prime Minister are subject to judicial review in accordance with the standards of administrative law. "The government's discretion, like the discretion of any minister within the government or any other authority, is constrained and guided by legal rules, and the Court is charged with upholding those rules. Among other things, the Government must exercise its powers based on relevant considerations, not on extraneous considerations. These must fall within the margin of reasonableness and proportionately" […] Any authority may make a decision that is not reasonable or that is not compatible with administrative law. The Government is no exception […] (*Hanegbi 2003*, 840).

159. An in-depth examination of the Amendment shows that its consequences in the area of the rule of law are most severe. As noted, the Amendment did not in any way affect the duty of reasonableness that applies to the Government, the Prime Minister and to each of the ministers, whose duty to act reasonably directly derives from their being public trustees (*Pinhasi*, 461). The Government, its ministers and every other administrative authority is thus subject to the duty "to weigh all of the relevant considerations, to refrain from considerations that are not relevant; […] to grant the appropriate weight to each of the relevant considerations in accordance with the circumstances, and to arrive at a balanced decision by means of a proper evaluation of the various factors that will fall within the margin of reasonableness" (*Djerbi*, para. 39).

However, following the Amendment, the duty of reasonableness is left unenforceable in regard to the Government and its members, as opposed to the other administrative authorities. In other words, the Amendment comprehensively establishes that the Court no longer holds jurisdiction to address the reasonableness of any decision adopted by the Government or any of its members, and accordingly, no longer holds jurisdiction to grant relief in those instances in which the decision adopted is unreasonable. This is so even though had the same decision been adopted by any other body or functionary in the executive branch – that is not part of the Government – the exemption would not apply, and the decision would be subject to judicial review on the ground of reasonableness.

160. The result of the legal situation created as a result of the Amendment is that, in regard to the elected echelon, *there is "law"* (the duty of reasonableness) but *no "judge"* who can examine the observance of the duty because the Amendment abolishes the jurisdiction of anyone holding judicial authority to hear arguments in regard to the reasonableness of decisions by the Government and its members or to grant relief on the basis of that ground. The result is that the elected echelon, that effectively holds the most governmental power and that has at its disposal broad powers that have the potential for inflicting severe harm to individuals and to the public interest, is exempt from judicial review in all that relates to the reasonableness of its decisions, and it has already been held that "in the absence of a judge, the law itself will vanish with him" (*Arpal*, 629). This situation constitutes a mortal blow to the principle of the rule of law, at both the formal and substantive levels. As was noted in *Eisenberg*:

> The exalted position of the Government as the State's executive authority (s. 1 of the Basic Law: The Government) cannot give it powers that the law does not confer upon it […]. Indeed, this is the strength of a democracy that respects the rule of law. This is *the rule of law in its formal sense*, whereby all government authorities, including the Government itself, are subject to the law. No authority is above the law; no authority may act unreasonably. This is also *the substantive rule of law*, according to which a balance must be made between the values, principles, and interests of the democratic society, while empowering the government to exercise discretion that properly balances the proper considerations (*ibid*., 274 – emphasis added).

161. The harm to the rule of law is particularly severe in view of the creation of "vacuums" in judicial review (or "normative black holes" in the words of the Petitioners and the Attorney General). This harm derives from the fact that the Court has been deprived of the possibility of effectively examining decisions made in entire areas in which the protection of extremely important public interests is based almost exclusively upon an examination of the reasonableness of the decisions of the Government and its ministers.

162. Thus, the reasonableness standard is the main tool granted to the Court for ensuring integrity in the civil service. This is expressed primarily in all that concerns *improper appointments*

to public offices. It is the reasonableness standard that enables judicial review in extreme situations in which, even thought the appointment was made with authority and in accordance with the formal requirements, there was a severe defect in the discretion of the appointing body. Indeed, "the history of the public administration in Israel is burdened with cases, not one and not two, in which it was possible to prevent patently improper appointments only in the context of reasonableness, since on the 'formal' side it received a 'passing' grade (*Hanegbi* 2014, para. 2, *per* Deputy President Rubinstein; and see: *ibid*., para 2, *per* President Naor; for an up-to-date survey on the matter, see: Bell Yosef & Elad Gil, "The Use of the Reasonableness Standard in the Oversight of Public Appointments," Tachlit – Institute for Israeli Public Policy (July 2, 2023) [Hebrew]). The contribution of the reasonableness standard to ethical integrity in the civil service is significant particularly given the fact that the other ground that might be relevant in this regard – the ground of extraneous considerations, which can serve for examining improper political appointments – involves significant evidentiary problems, and in practice, this claim is rarely accepted in regard to an appointment (see: BARAK-EREZ, ADMINISTRATIVE LAW, 658; Miriam Ben-Porat, "Political Appointments (Specific Problems)," SHAMGAR VOLUME, Part I, 91, 106-110 (2003); for a rare case of this type, see: HCJ 6458/96 *Abu Krinat v. Minister of the Interior* [128] 139-140).

163. The importance of the reasonableness standard as it relates to decisions by the elected echelon is prominently expressed in appointments to public office of persons tainted by significant moral turpitude, regarding whom appropriate weight was not given to the principles of ethical integrity, good governance, and the public trust in governmental authorities. Thus, the appointment of a person who had been involved in extremely serious offenses to the post of Director General of a government agency was rescinded, inter alia, on the basis of reasonableness (*Eisenberg*; and see: *Sarid*). It has been held that the Prime Minister was required to dismiss ministers and deputy ministers against whom criminal charges were filed for corruption or who were convicted of criminal acts a number of times (*Deri*; *Pinhasi*; *Scheinfeld*). The extension of the tenure of a senior office holder in the Ministry of Transportation was cancelled due to his conviction in disciplinary proceedings for offenses perpetrated in the course of his service (HCJ 7542/05 *Portman v. Shitreet* [129]). A decision by the Minister of Defense to promote an officer to the rank of general was canceled due to his admission of unbecoming conduct of a sexual nature and his conviction by a disciplinary tribunal (HCJ 1284/99 *A v. Chief of General Staff* [130]).

164. In other situations, the reasonableness standard served as the legal basis for protecting against an inappropriate deviation from proper conduct in the public administration. Thus, for example, this Court invalidated an appointment made contrary to the recommendation of the appointments committee, noting that the impression was that the "dominant motive" for the appointment was "the close political connection" between the appointee and the responsible minister, as opposed to professional considerations of appropriateness to the office (*Djerbi*, para. 62, *per* Justice Procaccia). It has also been held that a situation in which a deputy minister wields the powers of the ministry in practice, while the Prime Minister is defined as the minister ("Deputy Minister with the status of a Minister") is unreasonable in the extreme (HCJ 3132/15 *Yesh Atid Party v. Prime Minister* [130]). The case law has also noted that refraining from making appointments to vital positions while leaving the office unfilled over time causes severe harm to the public and may be deemed unreasonable (see: HCJ 268/13 *Chai v. Exceptions Committee for Appointments to Senior Positions in the Prime Minister's Office* [132] para. 19; HCJ 1004/15 *Movement for Governability and Democracy v. Minister of the Interior* [133] paras. 15-16, *per* President Naor).

165. The danger in denying the possibility of judicial intervention in extreme situations in which an appointment by the Government and its ministers is tainted by a serious defect is particularly great. This, in view of the nature of the appointments for which they are responsible. The Government is responsible for appointments to the most senior positions in the public service, among them, the Chief of the General Staff, the Director of the Israel Security Agency, the Police Commissioner, the Governor of the Bank of Israel, and the Commissioner of the Prison Service (sec. 3(c) of Basic Law: The Military; sec. 2(a) of the General Security Service Law, 5762-2002; sec. 8A of the Police Ordinance [New Version], 5731-1971 (hereinafter: Police Ordinance); sec. 6 of the Bank of Israel Law, 5770-2010; sec. 78 of the Prisons Ordinance [New Version], 5732-1971 (hereinafter: Prisons Ordinance)). In addition, sec. 23 of the Civil Service (Appointments) Law, 5719 – 1959 (hereinafter: Civil Service Law) allows the Government to decide which appointments require its approval, and this list currently includes, inter alia, the Director of the National Security Council, the Attorney General and Deputy Attorneys General, the State Attorney, the Director of the Atomic Energy Commission, the Director of National Economic Council, the Accountant General, the Budget Director, the Commissioner for Capital Markets, the Director of

the Tax Authority, the Director of the Population and Immigration Authority, Israeli ambassadors throughout the world, and more (see: Second Appendix to the Civil Service Law). Along with that, there is a long list of senior appointments that fall under the authority of Government ministers (see, for example: sec. 18 of the Government Corporations Law, 5735-1975 (hereinafter: Government Corporations Law); sec. 8 of the Public Broadcasting Law, 5774-2014; sec. 3 of the Securities Law, 5728-1968; sec. 2 of the Planning and Building Law; sec. 7 of the Police Ordinance; sec. 79 of the Prison Service Law).

Moreover, the Government and the ministers are often able to dismiss those senior officer holders, inter alia, on the basis of the general directive in sec. 14 of the Interpretation Law, 5741-1981, according to which: "Any empowerment to make an appointment implies empowerment to suspend the validity thereof or to revoke it, to dismiss the person appointed or to suspend him from office" (and see: art. 15 of the Order-in-Council; Zamir, "Administrative Authority," 565, 656-657); HCJ 3884/16 *A. v. Minister of Internal Security* [134] para. 21). While there are, at present, appointments that require the recommendation of an advisory committee or a selection committee for which there are also established procedures for the termination of office, those requirement are primarily grounded in Government decisions that can be revoked (see, inter alia: Decision 3839 of the 34th Government "The Advisory Council for Appointments to Senior Positions and the Revocation of Government Decisions" (May 27, 2018); Decision 516 of the 9th Government "Conditions for Appointment to Certain Offices" (Aug. 14, 1960); Decision 4892 of the 27th Government "Appointments Commission headed by the Civil Service Commissioner – Amendment of Government Decision no. 516 of Aug. 14, 1960" (March 7, 1999); Decision 2274 of the 28th Government "Report of the Public Committee for Examining Procedures for the Appointment of the Attorney General" (Aug. 20, 2000)). Even assuming that these decisions will remain in force, abolishing the reasonableness standard will block judicial review in situations in which appropriate weight is not given to the recommendations of the relevant bodies (as occurred, for example, in *Djerbi*).

166. Thus, removing judicial oversight of the reasonableness of decisions by the Government and the ministers in regard to all the appointments under their authority will leave the public without any real protection in situations in which senior members of the civil service are appointed or dismissed solely for political reasons. As the Petitioners and the Attorney General emphasized,

the consequences in this area are particularly severe in regard to those entrusted with enforcing the law – like the Attorney General, the State Attorney, and the Police Commissioner – where, in the absence of active judicial review, the question of their appointment and continued service becomes entirely dependent upon the graces of the elected echelon in a manner that might undermine their independence. This element of the independence of the law enforcement system is necessary to fulfilling its role in the protection of the rule of law in the state, and it is also vital to the State of Israel's ability to contend with legal challenges in the international arena (see: Amichai Cohen, "International Criminal Law," INTERNATIONAL LAW 473, 507 (Yael Ronen, ed., 4th ed., 2023)). This last point in regard to the international consequences of the Amendment was the focus of the Numa Petition and is also mentioned in para. 307 of the Attorney General's Affidavit in Response).

In the course of the Committee's debates, the subject of appointments and dismissals in the civil service was presented again and again as a critical issue by participants in the debates and by the Committee's legal advisors in particular. In this regard, possibilities for establishing alternatives to judicial review were also raised (see: Transcript of meeting 120, 91-92; Transcript of meeting 121, 11-12). However, such mechanisms were not adopted in the end, and instead, a clarification was added to the end of the final draft according to which "decision" means "any decision, including in matters of appointments […]". In the absence of any response to clear harm to the tools for protecting ethical integrity and good governance of the administration caused by the abolition of the reasonableness standard in regard appointments and dismissals of the most senior functionaries of the state, it would appear that the Amendment creates a real danger that the civil service, which "is intended to provide for the needs of the public in all aspects of life" (HCJ 8815/05 *Landstein v. Spiegler* [135] para. 8), will be fundamentally changed, and not for the better.

167. An additional "normative vacuum" created as a result of the Amendment concerns the examination of the discretion of *transition governments*. In accordance with the principle of the continuity of the Government, anchored in sec. 30 of Basic Law: The Government, a Government that no longer enjoys the Knesset's confidence continues to serve as the executive authority of the state for as long as another Government has not won the confidence of the Knesset. This is intended to prevent a "governmental vacuum" and to ensure government continuity (HCJ 5167/00 *Weiss v. Prime Minister* [136] 465 (hereinafter: *Weiss*); HCJ 7510/19 *Or-Cohen v. Prime Minister* [137] paras. 1 and 10 of my opinion). The primary concern that derives from this governmental situation

is that such a Government might adopt decisions intended to garner political advantage in the upcoming elections or to tie the hands of the next Government (*ibid*., para. 10 of my opinion; and see: SHETREET, 520). In this regard, the case law has made it clear that although the *powers* of a transition government are no different from those of a "regular" Government, in term of *discretion* "the margin of reasonableness of a transition government is more narrow than that of a Government that serves by virtue of the confidence of the Knesset" (*Kohelet Forum*, para. 6 of my opinion; and see: Weiss, 470; HCJ 9202/08 *Livnat v. Prime Minister* [138] para. 4). Therefore, it is the duty of the transitional government to maintain a balance between moderation and restraint – which derive from the very fact of its being a Government that does not enjoy the confidence of the Knesset – and the need to ensure stability, continuity, and the proper functioning of the government institutions (*Kohelet Forum*, para. 7 of my opinion). Against this background, when the Court examined the decisions of transition governments and found a defect in the balance among the relevant considerations, it declared them void (see: HCJ 9577/02 *Mafdal v. Speaker of the Knesset* [139]; HCJ 4065/09 *Cohen v. Minister of the Interior* [140]; *Lavi*).

168. Preventing the possibility of examining the reasonableness of the decisions of transition governments may result in harm of broad scope to the public interest, as it would allow the Government and the ministers acting as a transition government to more easily exploit the powers and resources at their disposal during the elections period for the purpose of unnecessary appointments or in order to gain an unfair advantage in anticipation of the elections, for example, by means of what is referred to an "elections economy" (see and compare: *Lavi*, para. 1, *per* Justice Sohlberg; and see the statement of Advocate Blay in the Transcript of meeting 121, 11). According to the Knesset, it would be possible to contend with the "vacuum" created in the rules for a transition government by developing the extraneous considerations ground (see: para. 316(d) of the Knesset's Affidavit in Response). However, in order to provide effective protection of the public interest in this context, it would be necessary to completely change the evidentiary requirements for proving the claim, in a manner that would change its character. Furthermore, contrary to the Knesset's position, the principle of equality in elections anchored in sec. 4 of Basic Law: The Knesset cannot serve as a real alternative to examining the reasonableness of a decision. The Knesset refers, in this regard, to *Bergman*, but that and other similar matters did not treat of the day-to-day decisions made by a transition government, but rather with situations in which the

equality in the conditions for the competing parties was clearly violated, for example, in regard to aspects of funding the elections (see: *Derech Eretz*; *HCJ 141/82*; HCJ 142/89 *Laor Movement v. Speaker of the Knesset* [141]; HCJ 2060/91 *Cohen v. Shilansky* [142]). Therefore, in the existing legal situation, the Amendment leads, inter alia, to clear harm to the rule of law at a critical juncture prior to the elections, in a manner that might affect the rules of the democratic game themselves.

169. In addition to the areas of elections and the rules for transition governments, there are other public interests that cannot be protected against serious violations by the elected echelon in the absence of the reasonableness standard. One example of this, which was presented in the amicus brief filed by the Adam Teva V'Din Association, is the *environmental impact* of decisions by the Government and its ministers. Although these effects so not necessarily cause direct harm to a particular individual, they concern public health and quality of life (for example, in cases of environmental pollution) even for future generations (see: HCJ 4128/02 *Adam Teva V'Din v. Prime Minister* [143] 512-513). Decisions "to pave roads, build cities, develop industry and provide the means for protecting the public and its security" (*ibid*., 513) can lead to a head-on clash with protection of the environment. In this regard, the reasonableness standard has more than once made it possible for the Court to intervene when it found that appropriate weight was not assigned to considerations related to environmental protection in decisions adopted by the Government and its ministers (see, e.g.: HCJ 9409/05 *Adam Teva V'Din v. National Planning and Building Committee* [144]; HCJ 1756/10 *Holon Municipality v. Minister of the Interior* [145]). Without the reasonableness standard, the courts will have difficulty granting relief in cases where decisions by the elected echelon may cause *irreversible* harm to environmental values.

170. From all the above, we see that in addition to the difficulty of the existence of law without a judge, abolishing judicial review on the basis of reasonableness causes clear, immediate harm in a range of areas in which the lawfulness of government activities is examined from the perspective of that standard. The starting point is that "access to the courts is the cornerstone of the rule of law" (*Ressler*, 462). Therefore, the case law has narrowly construed regular statutory provisions that placed restrictions upon the jurisdiction of the courts to examine certain administrative decisions, and has held, inter alia, that in all that regards the jurisdiction of the High Court of Justice, such provisions must be examined in light of the provisions of sec. 15 of Basic Law: The Judiciary (see: *National Insurance Institute*, 451-452; *Herut*, 756). Abolishing judicial review of

the reasonableness of decisions by the Government, the Prime Minister, and the ministers has now been established in the Basic Law itself, and expressly so. But one cannot ignore the far-reaching significance of the Amendment as described above, which derives from its sweeping language and its application to all the decisions of the elected echelon and all the courts, including this Court sitting as Hight Court of Justice. This is an unprecedented step that clearly goes beyond every provision that limited the jurisdiction of the Court in the past, and it facially contradicts the principle of the rule of law for all the reasons laid out above.

171. In this regard, the Government Respondents referred to other legal systems, noting that the case law in Great Britain and the United States has recognized the possibility of revoking the jurisdiction of the courts through legislation (for a survey in this regard, upon which the Government Respondents relied, see: DOTAN, JUDICIAL REVIEW, 233-236). In view of the significant differences, which I addressed above, between our system and other systems in all that regards the system of checks and balances on governmental power, there is an inherent problem in this comparison. Moreover, the Government Respondents did not present even one example of a statutory limitation in regard to the activities of the most senior elements of the executive branch that is of such exceptionally broad scope as those deriving from the amendment that is the subject of the petitions (on the exceptional nature of the limitation established in the Amendment from a comparative law perspective, also see: the Preparatory Document of June 23, 2023, p. 6). One of the examples cited by the Government Respondents in this regard is the recent British judgment in *R v Upper Tribunal (Immigration and Asylum Chamber)* [160], which addressed a law that removed the jurisdiction of the court to conduct judicial review of an administrative tribunal, including both the trial and appeals court (see: Tribunals, Courts and Enforcement Act 2007, c. 2, § 11A). That judgment treated of the removal of the possibility for a *third* examination of administrative decisions *in specific areas*, after two quasi-judicial instances had addressed them. As opposed to that, in our matter, the Amendment establishes that the reasonableness of *all* decisions of the Government, the Prime Minister, and the ministers shall not be subject to judicial review *of any sort*.

172. From the data presented by the Knesset, we learn that over the last decade the High Court of Justice has handed down 44 judgments in which petitions were granted (in whole or in part) on the basis of the reasonableness standard, of them, 16 judgments concerned decisions by the

Government or one of its ministers. This data shows that the scope of intervention on the basis of the reasonableness standard is not great (and see: ZAMIR, ADMINISTRATIVE POWER, 3604). This is primarily attributable to the consistent position of the case law that "the court does not examine whether it was possible to make a more correct, more proper, more efficient, or better decision. As long as the decision that was chosen falls within the margin of reasonableness, there is no ground for the intervention of the court" (*Emunah*, 511; and see: HCJ 3758/17 *Histadrut v. Courts Administration* [146] para. 35, *per* Justice Danziger; HCJ 4838/17 *Unipharm, Ltd. v. Natural Gas Authority* [147] para. 32). It has similarly been explained on numerous occasions that one must show *extreme* unreasonableness in order for the Court to be willing to intervene in the discretion of the authorized body (see, e.g.: HCJ 4374/15 *Movement for Quality Government v. Prime Minister* [148] para. 46, *per* Deputy President Rubinstein; HCJ 6637/16 *Levenstein Levi v. State of Israel* [149] para. 32, *per* Justice Vogelman). This is all the more so the approach where Government and ministerial decisions are concerned. This is so given the rule in regard to the broad margin of reasonableness in regard to decisions made by authorities "of high status in the governmental hierarchy" (HCJ 4999/03, para. 18 of my opinion). This rule accordingly leads to limiting the scope of judicial review in their regard.

173. Nevertheless, although the number of a cases in which the Court ultimately intervened in administrative decisions on the basis of the reasonableness standard it not large, that is not a reason for underestimating the severity of the consequences of the Amendment. First, the data illustrates that despite the Court's restraint in regard to governmental and ministerial decisions, those decisions constitute more than a third of the decisions voided by the Court on the basis of the reasonableness standard over the period surveyed. Second, one cannot evaluate the importance and the influence of the reasonableness standard only on the basis of the cases that came before the Court. As President Naor emphasized:

> The importance of reasonableness is in the deterrence of the government authorities. An authority that knows that the Court may intervene in its actions if it acts extremely unreasonably, will examine the reasonableness of its decision before adopting it (*Hanegbi, 2014*, para. 2; and see: BARAK-EREZ, ADMINISTRATIVE LAW, 769).

The Attorney General also noted this in her Affidavit in Response, in which she pointed out that judicial review was not required in regard to the overwhelming majority of governmental decisions, inter alia, because the legal advisors already emphasize the need to meet the duty of reasonableness under the circumstances in the decision-making process. However, the Attorney General was of the opinion that "from the moment that such decisions will no longer be subject to effective judicial review, and the person harmed by the decision will no longer have a judicial remedy, the Attorney General's opinion in regard to that decision will naturally be of limited, if any, influence" (*ibid*., para. 283). Indeed, despite the fact that the duty to act reasonably still applies to the elected echelon, denying the possibility of judicial review of the reasonableness of Government and ministerial decisions bears direct, severe consequences for the stages of developing and reaching decisions inasmuch as "a government that knows in advance that it is not subject to judicial review might not give reign to the law and might cause its breach" (HCJ 217/80 *Segal v. Minister of the Interior* [150].

174. Lastly, it should be emphasized that the future consequences of the Amendment may be far more severe, given that it does not comprise any restriction upon the transfer of powers currently held by other agencies of the executive to the Government and the ministers. Section 34 of Basic Law: The Government establishes: "A Minister, who is in charge of implementing a law, is entitled to assume any power, with the exception of powers of a judicial nature, which is conferred by that law upon a civil servant, unless another intention is implied in the law. The Minister is entitled to act as stated with regards to a particular matter, or a specific period". In other words, nothing can prevent a minister from assuming the power to make the most harmful decisions, in terms of their reasonableness, in order to make them immune from judicial review. In its Affidavit in Response, the Knesset proposed that the Court examine whether there was an abuse of the authority to assume the power (*ibid*., para. 316(e)), but given that the assumption of power would be lawful, and in view of the difficulty in proving that the assumption of power was done for extraneous considerations, it would seem that the main ground that could be employed for examining the minister's discretion would actually be that of reasonableness. In any case, as we learn from MK Rothman's statement in the course of the Committee's debates, the ability of a minister to assume powers is not a "bug" in the Amendment, but rather one of its features:

> Advocate Blay: There is a fear that the system of incentives will be such that when there is a decision regarding which there is a concern about its reasonableness, the minister will then make that decision in order to grant it immunity.
>
> MK Rothman: Excellent. No, not in order to grant it immunity. Excuse me, that is a statement that I do not accept. Not in order to grant it immunity. When there is a decision that the minister thinks must be adopted because it is reasonable, because it is a decision that he sees as appropriate and correct that should be accepted in this specific case, then he will do it (Transcript of meeting 125, p. 27).

The Government Respondents also explain that in their view "if a minister assumed the power of another body […] then it is a decision that the minister adopted in the scope of his authority, and it would not be subject to judicial review on the ground of reasonableness" (para. 46 of their Supplemental Brief; and see para. 28 of the Knesset's Supplemental Brief). They further argue that "if a minister established a policy in the scope of his authority, an individual decision made as a direct result of that policy is not subject to judicial review on the ground of reasonableness" (*ibid*.). It should also be noted that it is possible to amend the law in a manner that would expand the powers held by ministers (as an example in this regard, the Attorney General pointed to the Police Ordinance (Amendment no. 37) Law, 5783-2022, which recently expanded the powers of the Minister of National Security, regarding which there is a pending proceeding before this Court – HCJ 8987/22 *Movement for Quality Government in Israel v. Knesset*). All the above serves to demonstrate the broad scope of the influence of the Amendment, even beyond the specific powers currently granted by law to the Government and the ministers.

175. Judicial review of the decisions of governmental authorities, among them the Government and its ministers, is a "cornerstone of a democracy which upholds the rule of law" (*Hanegbi* 2003, 834-835). Examining the significance of the Amendment in depth shows that denying judicial review in regard to the reasonableness of Government and ministerial decisions leads to destructive, harmful consequences at the very heart of the rule of law. We are concerned with a fatal, multi-dimensional blow: in practice, the Amendment leads to placing the Government and

its ministers "above the law"; it creates judicial review "vacuums" in regard to important public interests like good governance and the integrity of the civil service, as well as in regard to the conduct of a transition government during the elections period; and it opens the door to the transfer of broad powers to the ministers in order to shield decisions from judicial review.

E. Amendment no. 3 to Basic Law: The Judiciary constitutes a Deviation from Constituent Authority

176. Amendment no. 3 to Basic Law: The Judiciary is an extreme, exceptional amendment by any criterion. It has no parallel in our constitutional history and it strikes head-on at the heart of two of the core characteristics of the State of Israel as a democratic state. The words of Justice Rivlin, written some two decades ago, are appropriate here:

> The rule of law, the separation of powers, the checks and balances that accompany this separation, the power of judicial review, and the other mechanisms of democracy – form the central pillars of a democratic society. They constitute the essential conditions for the preservation of human rights. They form the nucleus of any democratic society that strives to promote human welfare.
>
> In light of the above, it has been stated on more than one occasion that this Court is charged with overseeing the legality and reasonableness of the activities of the State […] The Court's powers of judgment and judicial review of government authorities constitute "an integral part of a truly democratic society, and anyone undermining this is liable to topple one of the pillars of the state" […] (*Hanegbi* 2003, 835).

177. Denying the reasonableness standard in regard to decisions by the elected echelon significantly increases the power concentrated in the hands of the Government and poses a real threat to the individual, whose path to the Court for the purpose of obtaining relief is barred in a variety of situations in which he may suffer serious harm to his important interests as a result of governmental actions. Along with this, the Amendment gives rise to a situation in which, although the duty of reasonableness continues to apply to all of the administrative authorities, the most

powerful elements of the executive branch are effectively exempt from that duty in the absence of any possibility of enforcing it upon them. This situation in which "there is law but no judge" leaves entire areas of important decisions without effective judicial review, it prevents the protection of public interests like ethical conduct and good governance, it may lead to a fundamental change of the civil service in the state, to severe harm to the independence of the law enforcement system, and to the exploitation of governmental resources for political gain during elections.

178. The reasonableness standard has been developed in the case law since the founding of the state and became grounded as "a central and critical tool for exercising judicial review of the administration" (*Merchants Association*, para. 37, *per* Justice Barak-Erez). In view of the severe consequences deriving from the comprehensive exemption from judicial review on the ground of reasonableness granted to the elected echelon, I am of the opinion that the Amendment in which that exemption was established stands in facial contradiction to the existing constitutional foundation.

Although it only abolishes one ground among the grounds for administrative review in regard to the elected echelon, the specific amendment before us grants, by its extreme language, absolute immunity from judicial review of the reasonableness of *all* the decisions of the elected echelon, which holds the most governmental power. The Amendment does not permit an individual to turn to the Court to present arguments in regard to the reasonableness of those decisions, and it constitutes a sweeping removal of oversight and of necessary restrictions of the Government and its ministers, without adopting any other mechanisms to compensate for that. It is possible that such a denial of one ground for review in regard to the elected echelon in another legal system would lead to a more moderate infringement of the separation of powers and the rule of law. But an examination of the Amendment against the background of Israel's constitutional reality shows that such a significant limiting of judicial review in regard to the elected echelon in that reality undermines the foundations of the already frail system of the checks and balances.

179. That being so, I have reached the conclusion that Amendment no. 3 to Basic Law: The Judiciary constitutes an edge case whose enactment constitutes a *deviation from the Knesset's constituent authority*. In view of this conclusion, there is no reason to address the arguments raised by the Petitioners and the Attorney General in regard to the overall plan for the reform of the legal

system, which is composed of other initiatives that have not yet been approved by the Knesset. The Amendment before us itself contradicts foundational principles grounding the democratic character of our system, given the magnitude of its harm to the principles of the rule of law and the separation of powers.

F. The Remedy for the Knesset's Deviation from Constituent Authority

180. The Petitioners and the Attorney General argue that in view of the Knesset's deviation from its constituent authority, the Amendment should be declared void.

Is voiding the Amendment the remedy required by the situation before us? Would it not be possible to suffice with a more moderate constitutional remedy (compare: Arad-Pinkas, paras. 32-38, *per* Justice Vogelman)?

181. The case law and the literature have recognized situations in which it was possible to suffice with the remedy of severance by physically or conceptually separating the valid part from the invalid part that must be voided, to the extent that it is possible given the purpose of the law and the legislative tapestry (*Arad Pinkas*, para. 37 of my opinion; *Eitan*, para. 81, Justice Vogelman; Aharon Barak, "On the Theory of Constitutional Remedies," 20 MISHPAT V'ASAKIM 301, 350-353 (2017) [Hebrew]). The possibility of granting such relief was not raised by the parties, and I believe it was for good reason. Physical textual severance is not relevant to the matter in view of the Amendment's general, comprehensive language. Conceptual severance – for example, by way of not applying the Amendment to certain decisions of the elected echelon – is also inappropriate here as the wording of the Amendment does not allow for a straightforward, clear distinction among the situations to which the Amendment would apply and those that would be removed from its compass. That being the case, applying conceptual severance would effectively require a complex, detailed process of rewriting the constitutional text *de novo* by the Court. It has already been held in this regard that the Court is not meant "to determine the details of the legislative arrangement that will replace the unconstitutional act of legislation. This is the responsibility of the Knesset" (HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* [151] 639; and see: HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [152] 413-414). This is *a fortiori* the case where a Basic Law is concerned. It is not the

role of the Court to enact a new amendment to the Basic Law to replace the extreme, exceptional amendment that the constituent authority chose to enact.

182. Another possibility raised by some of the Petitioners is the remedy of postponed application, which was noted as an alternative remedy on the basis of the doctrine of abuse of constituent power. Given that the Knesset's deviation from its constituent authority is to be found in the content of the arrangement itself and is not contingent upon the date of its entry into force, this remedy is insufficient to repair the Amendment's severe harm to the nuclear characteristics of our system.

183. In the absence of another remedy that might provide a response to the unprecedented harm to the nuclear characteristics of the State of Israel as a democratic state at a result of Amendment no. 3 to Basic Law: The Judiciary, I am of the opinion that there is no recourse but to declare the Amendment void.

G. Additional Defects raised by the petitions

184. In view of my conclusion according to which the Amendment should be declared void by reason of the Knesset's deviation from the boundaries of its constituent authority, I can, as noted, suffice with but a few comments upon the arguments raised by the Petitioners and the Attorney General in regard to other defects in the Amendment.

G.1. The Claim that the Amendment constitutes an abuse of constituent power

185. One of the arguments raised in the Petitions before us is that the Amendment does not satisfy the supplementary tests established in *Shafir* for identifying a constitutional norm – particularly the test of generality and that of compatibility to the constitutional fabric – and it should therefore be held that it was enacted through an *abuse of the constituent power.* The Attorney General is also of the opinion that the Amendment constitutes an abuse of constituent power and does not satisfy the supplementary tests established in this regard in *Shafir*.

186. The Amendment before us does indeed raise serious questions in terms of satisfying the supplementary tests for identifying a constitutional norm. The primary difficulty concerns the test of *compatibility with the constitutional fabric*. This test is based upon the presumption that "as

opposed to ‘regular’ legislation intended to address everyday matters, basic legislation is intended to address matters at the core of the constitutional regime of the State of Israel” (*Shafir*, para. 41 of my opinion).

187. Basic Law: The Judiciary, to which sec. 15(d1) was added by Amendment no. 3, establishes a list of general constitutional principles in regard to the operation of the courts. The Explanatory Notes to the Basic Law bill already explained that it only establishes a general framework, and that concrete provisions as to the exercise of the authority of the Supreme Court and the other courts will be established in supplementary laws (Explanatory Notes to Basic Law: The Judiciary Bill, *Bills* 5738, 236; *Shafir*, para. 10, *per* Deputy President Hendel). Indeed, a few months after enacting Basic Law: The Judiciary, the current version of the Courts Law [Consolidated Version], 5744-1984, was enacted (hereinafter: *Courts Law*), which establishes a number of implementary provisions in regard to the jurisdiction and activities of the courts.

This conception of the general nature of the arrangement established in Basic Law: The Judiciary is clearly reflected in its provisions. Thus, sec. 15 of the Basic Law arranges the general jurisdiction of the Supreme Court and expressly states that “other powers of the Supreme Court shall be prescribed by law” (sec. 15(e)). Among the general matters of jurisdiction arranged in the Basic Law, sec. 1(c) anchors the jurisdiction in principle of the Supreme Court sitting as High Court of Justice “to provide relief for the sake of justice”, and sec. 15(d) details the broad categories in which the High Court of Justice may grant orders – for example, to issue orders to “state authorities, to local authorities, to their officials, and to other bodies and persons holding public office under the law” (sec. 15(d)(2)). Section 15(d) does not treat of the details of the legal causes of action that might justify judicial intervention, and it also expressly establishes that *nothing therein* detracts from the general jurisdiction of the High Court of Justice as stated in sec. 15(c). In other words, even if a particular case does not fall within one of the categories listed in sec. 15(d), this Court sitting as High Court of Justice has the general jurisdiction to grant relief for the sake of justice in such cases where it sees a need (see: BARAK-EREZ, PROCEDURAL ADMINISTRATIVE LAW, 53). As for other judicial instances, the Basic Law establishes that the “establishment, powers, seat and jurisdiction areas of district courts, magistrates' courts, and other courts shall be in accordance with the law” (sec. 16).

188. Against the background of the general provisions of Basic Law: The Judiciary, it is difficult to harmonize the Amendment – in term of its character and level of abstractness – with the Basic Law that it amends. In practice, sec. 15(d1), which was added by the Amendment, establishes a specific arrangement in regard to the abolition of a specific ground of judicial review in the field of administrative law. This section is inconsistent with the internal logic of the general arrangement established under sec. 15 of the Basic Law. Thus, while sec. 15 treats of the general jurisdiction of the *Supreme Court*, the Amendment concerns the narrowing of the jurisdiction of *all* the courts ("a holder of judicial authority under law") in regard to judicial review.

189. The exceptional nature of the Amendment – which abolishes a specific administrative standard – in the framework of Basic Law: The Judiciary is particularly remarkable given that the rules of administrative law, including the duty of reasonableness to which the Amendment refers, are not set out in statutory law, let alone in basic legislation. This problem concerning the exceptionality of the Amendment was addressed by the Committee's legal advisor, Advocate Blay, in the course of the Committee's debates on the bill (Transcript of meeting 105, p. 85). The Deputy Attorney General, Advocate Limon, also addressed the exceptionality of the amendment to Basic Law: The Judiciary:

> Had the bill actually sought to treat of the complexity of the reasonableness standard, and there is such complexity, as I will explain further on – it would first address all of the definitions of the reasonableness duty in administrative law, and not do so by means of amending Basic Law: The Judiciary. But the bill does not refer in any way to the basic principle – the grounding of the reasonableness standard. Instead, the bill comprises only one element, with the most serious consequences – the absolute barring of judicial review of unreasonable decisions, based upon the identity of the decision maker, in regard to the most important decisions made by the highest level of government (Transcript of meeting 108, p. 10).

190. An examination of the general constitutional fabric also makes it difficult to harmonize the Amendment with other arrangements in Israeli law. Thus, we were not presented with a similar statutory provision that treats of the abolition of a specific cause of action or ground for

administrative review, as opposed to provisions that restrict or delimit judicial oversight, which are generally established in *primary legislation* (see, e.g.: sec. 16(c) of the Petroleum Law, 5712-1952; sec. 11(e) of the Victims of Hostile Action (Pensions) Law, 5770-1970; sec. 59 XXXI of the Government Companies Law, 5735-1975; sec. 5B of the Defense Service Law, 5746-1986).

191. In my opinion, the complex of problems noted above raises a serious concern that the decision to include the Amendment under the title "Basic Law" was intended for no other reason that to immunize it from the judicial review that applies to "regular" legislation (see and compare: *Porat*, 914; *Herut*, 756; HCJ 2208/02 *Salameh v. Minister of the Interior* [153] 953; BARAK-EREZ, PROCEDURAL ADMINISTRATIVE LAW, 125).

192. An additional problem raised in our matter concerns the *generality* test. In *Shafir*, the importance of the generality requirement was noted in regard to Basic Laws, whose character is meant to reflect broad societal consensus as opposed to the particular interests of some majority or another (see: para. 40 of my opinion; and see: Bendor, "Legal Status", 164). It was further made clear in that matter that a personal norm may be directed at a specific person as well as an institutional "persona" like the Knesset or a particular Government (*Shafir*, para. 40 of my opinion; *Academic Center*, para. 6, *per* Justice Hendel). It has also been held that the immediate entry into force of a norm does not absolutely rule out its identification as a constitutional norm, but it may sometimes raise a problem as to its generality (*Rotation Government*, paras. 14-15 of my opinion, and para. 5 *per* Justice Baron; and see: *Scheinfeld*, para. 42 of my opinion, and paras. 48-49 *per* Justice Barak-Erez).

In the matter before us, one cannot ignore the fact that the Amendment, which goes into immediate force, abolished judicial review on the basis of reasonableness only in regard to decisions by the Government and its ministers, while the other administrative authorities continue to be subject to it. Thus, the Amendment *exclusively* benefits the Government and its ministers. It grants them an "exemption" from judicial oversight in the circumstances to which it applies, and immediately strengthens their governmental power. This problem is sharpened given that the Government – which, as noted, is the sole beneficiary of the Amendment – is the one that, in practice, worked to promote the Amendment and approve it by means of the coalition majority that it enjoys in the Knesset. Under these circumstances, I am of the opinion that the unique

characteristics of the arrangement, among them the nature of the arrangement concerning the removal of the oversight mechanisms only as they apply to the Government and the ministers and its immediate application to the 37th Government – which is the "animating spirit" behind the Amendment – can, indeed, raise a concern that it is intended to serve the narrow interests of a particular political majority in a manner that would allow it to buttress its governmental power. This, as opposed to a similar amendment that would be advanced behind a "veil of ignorance" without being able to know to which Government it grants the "exemption" from judicial review on the ground of reasonableness.

However, and as noted above, I do not see any need to make a definitive ruling on the question of whether the problems noted above rise to the level of an abuse of constituent power in the present matter. This, in view of the conclusion I reached in regard to voiding the Amendment on other grounds.

G.2. Arguments concerning defects in the legislative process of the Amendment

193. The Petitioners argue at length in regard to *defects in the legislative process of the Amendment*. In this regard, it is argued, inter alia, that the manner in which the debates were conducted in the Constitution Committee and the short period in which the Amendment was advanced hindered the possibility for members of the Knesset to participate substantially in its legislative process. They additionally complained of the Amendment's being advanced as a Constitutional Committee bill under sec. 80 of the Knesset Rules which, they argue, was intended to circumvent the limitations that apply to private member's and government bills.

194. In view of the elevated status of Basic Laws in our system, the case law has emphasized that "the constituent authority must respect the norms that it creates wearing this hat, and ensure that changes in the rules of the game that define the constitution be carried out in a proper proceeding, with transparency and accountability to the public" (*Academic Center*, para. 5, *per* Justice Hendel). And in the same vein, it was noted in *Scheinfeld* that "it would be better that amendments to Basic Laws not be advanced hastily and on a fast track" (*Scheinfeld*, para. 45 of my opinion).

The manner in which the enactment of the Amendment was managed is not problem free in this regard, to put it mildly. As we see from surveying the proceedings in the Knesset, the legislative process took only about a month, despite the dramatic consequences and the strong objections raised in its regard. The very accelerated legislative process was expressed, inter alia, in the use that was made of the objections procedure and of sec. 98 of the Knesset Rules in order to establish special debate procedures and to shorten the timetable for approving the Amendment. Reading the transcripts of the debates shows that the Committee's debates were conducted in a harsh, adversarial manner, and in the final analysis, the various proposals raised in the course of the debates, both by members of the Committee and by the professionals who participated in the legislative process, received no expression whatsoever in the Amendment Bill presented for a second and third reading: the bill remained virtually unchanged in comparison to the parallel section that appeared in the draft of the Basic Law bill that MK Rothman submitted on January 17, 2023. In its Affidavit in Response, the Knesset also noted the problems that arose in the legislative process and noted that "it would have been possible to adopt a better process than the one implemented in practice" (*ibid*., para. 224). The Knesset's attorney fittingly noted this in the hearing of the Petitions (p. 6 of the Transcript).

195. Despite tall he problems noted, I am of the opinion that, as far as concerns the principle of participation – which establishes the right of the members of the Knesset to take part in the legislative process – the high threshold established for intervention in this regard, according to which one must show that the defect goes to the heart of the process and that the "Knesset members were not afforded the possibility to scrutinize and consider the proposed bill, even if only in the most basic sense" (*Quintinsky*, para. 79, *per* Justice Sohlberg); see and compare: HCJ 3234/15 *Yesh Atid Party v. Speaker of the Knesset* [154] para. 12) was not crossed.

196. The additional arguments raised by the Petitioners concerning the use of the provisions of sec. 80 of the Knesset Rules raise more complex questions. Section 74(b) of the Knesset Rules establishes three paths for submitting a bill to the Knesset: a *private member's* bill submitted by a member of Knesset who is not a minister or a deputy minister; a *government* bill; a bill on behalf of a Knesset *committee*. The legislative procedure for a bill on behalf of a committee is exceptional, and somewhat lenient in comparison to the legislative procedure for bills in the other two legislative paths. This is the case because bills presented on behalf of a committee are exempt from

the preliminary requirements that apply to a private member's bill prior to the first-reading stage, among them, holding a preliminary reading in the plenum and the requirement that the bill be laid on the table 45 days prior to the preliminary reading (secs. 75(e) and 76 of the Knesset Rules). In addition, the procedure for preparing a bill under the committee path is not subject to the provisions that apply to a government bill, such as the Attorney General's Directives that require preparatory administrative staff planning by the relevant ministry, preparation of a memorandum and its publication to the public, and approval of the bill by the Ministerial Committee for Legislation (Directives of the Attorney General 2.3.005 "Treatment of Government Bills" (March 5, 2018).

197. Therefore, there would seem to be good reason for sec. 80 of the Knesset Rules limiting the use of this abridged path to *certain* committees – the House Committee, the Constitution Committee, and the State Control Committee – and to a defined list of subjects, and this on the condition that the subject of the bill be within the sphere of the committee's competence:

> 80. (a) The House Committee, the Constitution, Law and Justice Committee, and the State Control Committee are entitled to initiate bills in the spheres of their competence as elaborated in these Rules of Procedure, on the following topics, and prepare them for the first reading: Basic Laws, matters that are required due to an amendment of a Basic Law, and are proposed side by side with it, the Knesset, Members of the Knesset, the elections to the Knesset, political parties, party financing, and the State Comptroller.
>
> (b) Once the Committee has prepared a bill for the First Reading, the Secretary General of the Knesset shall provide for its publication in the Official Gazette – Knesset Bills, together with explanatory notes.

198. The possibility of a Knesset committee submitting a bill – although it was actually put into practice in the first early years of the Knesset – was first arranged in a decision of the House Committee of Nov. 24, 1980 (Transcript of meeting 281 of the House Committee of the 9th Knesset, 2 (Nov. 24, 1980) (hereinafter: *the House Committee's Decision*). In 2011, the Knesset Rules were amended to add sec. 80 that established an arrangement materially similar to the one established by the House Committee. One of the changes included in the section, as opposed to House

Committee's Decision, was to limit the possibility of submitting bills on behalf of a committee to three specific committees and to the spheres of their competence as elaborated in the Rules of Procedure. Examining the House Committee's debates on the subject reveals that restricting the use of the path for bills on behalf of a Knesset committee derived, inter alia, from the concern that committees might employ this path in order to skip the preliminary stages and go directly to a first reading (Transcript of meeting 161 of the Knesset House Committee, the 18th Knesset, 55-56, 60 (March 1, 2011).

199. It would appear that, over the years, relatively little use was made of the path for submitting bills on behalf of a committee. In regard to Basic Laws, the data published on the Knesset website shows that since the establishment of the state, 26 bills initiated in bills on behalf of a committee for Basic Laws and for amending Basic Laws were approved in a third reading. An examination of the subjects addressed by those bills shows that, as a rule, they treated of subjects related in some way to the Knesset, for example: work procedures of the Knesset and its members, elections, and the Budget Law (see, e.g.: Basic Law: The Knesset (Amendment no. 12) *S.H.* 5771 90, which concerned the candidacy of a Member of Knesset who had left his faction to stand for election in the following Knesset; and Basic Law: The Knesset (Amendment no. 24), *S.H*. 5751 186, which comprises various provisions in regard to the Speaker of the Knesset and the Deputy Speaker). This is the case but for three prominent exceptions: the *first* is Basic Law: The Government (Amendment no. 6) *S.H*. 5757 114 – which treats of the capacity of a person who holds an additional citizenship to serve as a minister; the *second* is Basic Law: The Judiciary (Amendment no. 2), *S.H.* 5762 598 – which established that the Ombudsman of Judges would be included in the list of people who could recommend the termination of the tenure of a judge to the Judicial Selection Committee; and the *third* is the Amendment that is the subject of the present petitions. However, in the first two matters, as with the overwhelming majority of Basic Law bills that were adopted and that treated of matters of the Knesset, the bills were approved by a broad consensus and without significant opposition, which is not the case in the matter before us.

200. The method by which sec. 80 was employed over the years thus shows that Basic Law bills on behalf of the Constitution Committee were generally submitted when *at least one* of the following conditions was met: the first – the bill concerned *matters of the Knesset* (such as elections, party financing, the budget, etc.); the second – the bill was advanced with *broad support*.

This method was also addressed by the legal advisors of the Committee and of the Knesset in regard to the broader category of all the bills on behalf of a committee (and not just Basic Law bills). Thus, already in the Preparatory Document submitted by the Committee's legal advisors on January 16, 2023, which concerned the advancing of a Basic Law bill on the subject of government legal advisors, it was explained that bills on behalf of a committee constituted a relatively rare "legislative path" that "was reserved, in the overwhelming majority of cases, for subjects that were not controversial or to subjects tightly connected to the Knesset and its activities". The Knesset Legal Advisor, Advocate Afik, also pointed out that:

> The significance of a bill on behalf of a committee is, in effect, skipping over a process of preparation for the first reading, with all the significance that entails, and in effect, it makes the bill coming from the committee similar to a government bill.
>
> […]
>
> When we look at the bills on behalf of a committee that were proposed here over the years, it can be said: A – that were not many, it is not a process that the Knesset usually employs, that the high road in the Knesset is usually a private member's bill. Bills on behalf of a committee are really, as noted here, for times when there was a kind of consensus in the Knesset and they wanted to adopt it by means of a bill on behalf of a committee, which was appropriate to the subjects that appeared in the Knesset Rules in regard to that matter which the Knesset addresses and wants to find a solution for them (Transcript of meeting 7, p. 31)

201. In Advocate Afik's memorandum of January 25, 2023, she concluded that it was possible to advance the Basic Law: Strengthening the Separation of Powers Bill as a bill on behalf of the committee. That bill concerned changing the composition of the Judicial Selection Committee, limiting the judicial review of Basic Laws and primary legislation, and abolishing the reasonableness standard. This was the case because, in her opinion, that bill concerned "constitutional arrangements that arrange the relationship of the branches, and specifically, the relationship of the Knesset and the judiciary". A few months later, against the background of the

start of the debate on the Amendment Bill that is the subject of the petitions, Advocate Afik again referred to her memorandum of January 25, 2023 in regard to the Basic Law: Strengthening the Separation of Powers Bill, and noted that "we now have on the Constitution Committee's agenda the last element of that Basic Law bill – limiting the use of the reasonableness standard" (see: para. 4 of Advocate Afik's letter in response to MK Kariv of July 2, 2023, which was appended as R/17 to the Knesset's Affidavit in Response).

202. In my opinion, Advocate Afik's position in regard to the appropriateness of the Amendment Bill to the path of a bill on behalf of a committee raises a problem. As can be seen from the survey presented above, advancing the Amendment Bill that is the subject of the petitions as a bill on behalf of a committee constitutes a *significant* deviation from the Knesset's practice as established over the years in regard to the accepted use of the path established in sec. 80 of the Knesset Rules. Thus, as opposed to the manner in which the section was employed by the Knesset over the years, the amendment before us was clearly not advanced with a broad consensus, and it also does not treat of matters of the Knesset but rather of the scope of judicial review over the actions of the *Government*.

In examining the scope of the use of sec. 80 of the Knesset Rules, significant weight should be given to the practice by which bills for Basic Laws on behalf of committees that were approved concerned matters of the Knesset or were enacted with broad consensus (or both). In this regard, I noted in HCJ 706/19 *Frej v. Speaker of the Knesset* [151] that:

> The work tradition of the Knesset as customary and accepted by it certainly carries weight. According to sec. 19 of Basic Law: The Knesset, it determines how the Knesset should act where work procedures have not been prescribed by law or in the Rules. *A fortiori, weight should be given to the manner in which the Knesset acts when it acts over the course of years to implement a provision of the Rules in accordance with its accepted practice for interpreting it.* It has already been held that when a possible interpretation of a legal provision is consistent with the factual situation created and by which it acts, that should be preferred to another possible

interpretation that deviates from that situation (*ibid*., para. 9 – emphasis added); and see: *Edelstein*, para. 12 of my opinion).

203. Ensuring a proper legislative procedure is of particular importance when we are concerned with enacting a Basic Law. As I noted above, the absence of a rigid mechanism for adopting and amending Basic Laws is conspicuous in our constitutional project, and there is currently no real difference between the procedure for adopting and amending a Basic Law and the procedure for enacting "regular" laws as arranged in the Knesset Rules (see: para. 75 above; *Bar-On*, para. 20, *per* President Beinisch; *Academic Center*, para. 36, *per* Deputy President Rubinstein). Therefore, and in the absence of Basic Law: Legislation, I am of the opinion that one must be particularly strict in observing the provisions of the Knesset Rules in the process of adopting Basic Laws, which is currently the primary – and actually the only – mechanism that arranges the procedure for adopting and amending the norms that sit at the apex of our system's normative pyramid. One must, therefore, strictly insist that employing the path of a bill on behalf of a committee, established in sec. 80 of the Knesset Rules, be done only in the cases for which it was intended, in accordance with the work tradition that has been established by the Knesset in this regard. This is particularly so given the nature of the arrangement, which establishes an "abridged" path for advancing bills in comparison to private member's and government bills, and it therefore raises an inherent concern that it might be abused in order to circumvent the procedural requirements found in the other paths.

Afterward

204. After writing my opinion, I read the comprehensive opinions of the other members of the panel, and I would like to add but a few brief comments in regard to the opinions of my colleagues Justices Sohlberg and Mintz, who are of the opinion that there are no limits upon the Knesset's constituent power and that this Court lacks jurisdiction to review Basic Laws.

205. My colleague Justice Sohlberg dedicates a significant part of his opinion to a historical survey of the opinions of the Presidents and justices of this Court over the generations and seeks to derive from it that the consistent position of the case law since the establishment of the state is

that the constituent power of the Knesset is unrestricted. I find this conclusion problematic, to put it mildly. First, some of the judgments to which my colleague refers were written before there was a single Basic Law in the Statutes, and a few even preceded the "Harari Decision". Second, the vast majority of quotes that my colleague cites do not in any way concern the Knesset's power as a constituent authority. It is, therefore, unclear how he can rely upon those quotes that did not treat of the questions before us at present and that referred to an entirely different constitutional context.

Third, even were I to accept the position of my colleague Justice Sohlberg that one can apply those quotes to the matter before us, if only by analogy, my colleague's historical survey ends – and for good reason – at the beginning of the nineteen nineties. This, while completely ignoring the important developments and the significant strides in Israeli constitutional law over the course of the last three decades. The concept upon which my colleague Justice Sohlberg relies in regard to the unlimited sovereignty of the Knesset was not accepted in the *Mizrahi Bank* decision nor in the years that followed. Instead of that concept, the theory that was adopted over the years was that of the constituent authority, which recognizes that Basic Laws place restrictions upon the Knesset in enacting laws, while concomitantly not conceptually rejecting the existence of limits upon the constituent authority (see: *Mizrahi Bank*, 394; HCJ 4676/94 *Mitral, Ltd. v. Knesset* [156] 28; *The Tal Law* case, 717; *Bar-On*, 311-312; *Academic Center*, para. 35, *per* Deputy President (emer.) Rubinstein; para. 3, *per* Deputy President (emer.) Joubran; and para. 11, *per* Justice Mazuz). We also walked this same path just recently in an expanded panel in *Hasson*, where we held that the Knesset is not "all powerful" in adopting Basic Laws, and that it is not within its power to facially deny the nuclear characteristics of the State of Israel as a Jewish and democratic state.

206. In the opinion of my colleague Justice Sohlberg, I chose "to take the short path" in all that concerns the basic question of the source of the limitations upon the constituent power, and he further notes that it is unclear what those "constitutional data" may be from which we can learn of those limitations (para. 105 of his opinion). In that regard, I can only refer back to what is stated in paras. 64-67 above, and to paras. 19-31 of my opinion in *Hasson*, which also refer to that issue. In my view, the Declaration of Independence, the Basic laws, and the statutes enacted by the Knesset over the years, as well as the case law of this Court, clearly inform us that the identity of the State of Israel as a Jewish and democratic state cannot be questioned – not even by the

constituent authority. On this basic issue, it would seem that there is a gaping abyss between most of the members of this panel and my colleagues Justices Sohlberg and Mintz. In their view, as Justice Sohlberg writes, "all of the constitutional data leads to the opposite conclusion, according to which 'the habitat' of the constituent authority – is unlimited" (para. 105 of his opinion). In other words, My colleagues Justices Sohlberg and Mintz are of the opinion that any piece of legislation entitled "Basic Law", even if it dismantles the building blocks upon which the Israeli constitutional enterprise is built, and even if it defaces the "birth certificate" and the "identity card" of the State of Israel as a Jewish and democratic state, cannot be questioned. To that, I am afraid, I cannot agree.

207. The idea that there is no *explicit* source of authority that empowers the Court to examine whether the Knesset deviated from its constituent authority runs as a common thread through the opinions of my colleagues Justices Sohlberg and Mintz (see para. 70 above). But for my colleagues, this starting point is also the end point. I take a different position, and as I explained in my opinion, the approach of my colleagues in this regard has also not found purchase in many legal systems around the world, in which the courts have long held that even in the absence of an express basis, they hold the power to examine the "constitutionality" of amendments to the constitution as part of their role in defending it (see: paras. 61 and 69 above). In Israel, as we know, the task of establishing a constitution has not yet been completed. Therefore, we refrained from expressing a decisive view on this question. However, despite the complexity of the issue, it is no longer possible not to address it, and even the Government Respondents in these petitions asked that we decide this issue on the merits. Given that there are limits upon the Knesset's constituent power, given that the existing constitutional reality in Israel makes it possible to fundamentally change our Jewish and democratic character with great ease, and given the role of the Court in our legal system – I am of the opinion that in those edge cases in which the Knesset exceeded the boundaries of its constituent power, the Court holds jurisdiction to decide that the norm is not constitutionally valid.

208. My colleague Justice Sohlberg notes that even were he to accept the view that this Court holds jurisdiction to review Basic Laws, intervening in them requires a "consensus" among the justices (paras. 127-129 of his opinion). I assume that by those words, my colleague seeks to outline the approach for the constituent authority to establish the *lege ferenda* in accordance with

his approach. But as long as no other decision rule has been established in a statute or Basic Law, we have only the rule that when there is a difference of opinion among the justices, the decision will be in accordance with the opinion of the majority of the panel (sec. 80(a) of the Courts Law). And note – just as this Court is not meant to stand in the shoes of the constituent authority and establish what special majority is needed for adopting a Basic Law, it is not meant to "enact" special decision rules for itself. As we have noted on more than one occasion, in order to arrange these matters, it is necessary to enact Basic Law: Legislation, which, sadly, is still missing from our constitution-in-formation. That Basic Law is meant to address these issues and other important issues, while striking a balance among all the relevant, inextricably interrelated aspects.

209. I would also like to briefly address my colleague Justice Sohlberg's statements in regard to the path of proposing a Basic Law on behalf of a committee under sec. 80(a) of the Knesset Rules. My colleague is of the opinion that in carrying out an empirical examination of Basic Law bills on behalf of a committee, we should also consider those bills that were ultimately not adopted as Basic Laws. I do not think so. My colleague did not present even one example of a Basic Law bill on behalf of a committee that was not related to matters of the Knesset and that was not advanced by broad consensus and that nevertheless reached the "finish line". Judging by the results, this fact shows that when one of these conditions was not met, the debate on those bills ended without their finding their way to the lawbooks. As opposed to my colleague's position, I do not think that this is a "coincidence" but rather a practice that became established in the Knesset's work, which derives from the deviation of a Basic Law bill on behalf of a committee from the caution adopted by the Knesset in the past in making use of this path. This conclusion is supported by express statements of the Knesset Legal Advisor and the legal advisor to the Constitution Committee, who also pointed to such a practice (see para. 200 above). Therefore, even after reading my colleague's comments, I remain in my opinion that in examining the way that sec. 80(a) of the Knesset Rules has been used, we cannot ignore how the Knesset itself has acted over the years, and the practice that has become entrenched in its work in this regard.

210. My colleague Justice Mintz notes that "the very limiting of the scope of judicial review by this Court in regard to the administrative reasonableness standard […] is not a 'crossing of the line' by the legislature or the constituent" (para. 83 of his opinion). I can only agree. However, as I noted above, the Amendment does not only comprise some restriction or other upon the scope of

judicial intervention in certain situations. In practice, due to its extreme, sweeping language, it effectively constitutes an abolishing of the reasonableness duty that applies to the Government and its ministers that has unprecedented, disastrous consequences for the individual and for the entire Israeli public.

Lastly. I will admit that I cannot quite fathom what my colleague Justice Sohlberg intended by the proposal that he raised in para. 250, at the conclusion of his opinion. According to that proposal, alongside the declaration of the voiding of Amendment no. 3 by majority opinion, we should collectively add and declare that "we will no longer use the reasonableness standard in regard to decisions by the Government and its ministers" except in accordance with "that tried-and-true test that has served us well since the very beginning and until the decision in the matter of *Dapei Zahav* […]". Personally, I am of the opinion that now that Amendment no. 3 has been declared void by the majority, the Court should continue to walk its well-trod path, continuing to develop the case-law reasonableness standard from case to case and matter to matter "in the good manner of the Common Law" (para. 180 of the opinion of Justice Sohlberg); and see in the same matter: the response to the parliamentary question quoted in para. 178 of his opinion).

Before Concluding

211. About a month after the hearing in these petitions, a merciless terrorist attack befell us, and since then the State of Israel finds itself is in a hard and determined war against terrorist organizations that seek our destruction. We pray for the welfare of the soldiers and the members of the defense forces who risk their lives for the security of the state, and for the speedy return of those kidnapped to their homes.

But even at this difficult hour, the Court must fulfil its role and decide the issues brought before it. This is all the more so when the issues concern the nuclear characteristics of the identity of the State of Israel as a Jewish and democratic state. To this is added the fact that the publication of our judgment at the present time is required by sec. 15(a) of the Courts Law, given the date of the retirement of Justice (emer.) Baron and the date of my retirement from the bench.

Conclusion

212. Deciding upon these petitions required us, *en banc*, to address the sources and building blocks of the Israeli constitutional project:

> Since the Declaration of Independence and up to the present day we have chosen the constitutional path. We sought to endow ourselves with a constitution that would limit the power of the majority in order to fulfill the fundamental values of the State of Israel as a Jewish and democratic state […] Once this choice is made, the judges are required to uphold it (*Mizrahi Bank*, 398).

Upholding the choice to take the constitutional path means, in my opinion, an uncompromising defense against an extremely severe violation of any of the two pillars upon which the State was founded as a Jewish and democratic state.

213. The principle of majority rule is of the "soul of democracy" (*Mizrahi Bank*, 546). However, it does not constitute justification for enacting a constitutional norm that would so comprehensively prevent oversight and review of the decisions of the elected echelon. "Democracy is not only majority rule and is not solely a proper process for establishing the public will by means of representatives in the legislative body. Democracy is much more than that. Democracy is also the rights of each and every person, whether a part of the majority or a part of the minority. Democracy is also the separation of powers, the rule of law (formal and substantive) and the independence of the judiciary" (*The Tal Law case*, 719). Given the fragile, deficient system of checks and balances in Israel, the absolute elimination of judicial review of the reasonableness of decisions of the Government and its ministers renders a substantial part of the role of the Court in protecting the individual and the public interest devoid of content:

> Judicial review in a democratic state, according to the doctrine of separation of powers and the doctrine of checks and balances that developed from it, was not intended to strengthen governance but the opposite: to restrain the

> power of the government. To the extent that the law requires, in order to protect human rights and fundamental values from abuse of power, and to ensure good, proper, and fair governance. This function is placed upon the court and the court cannot properly fulfil this function without the reasonableness standard (ZAMIR, ADMINISTRATIVE POWER, 3614; and see: *Scheinfel*d, para. 4, *per* Justice Baron).

214. For the reasons elaborated above, Amendment no.3 to Basic Law: The Judiciary cannot, in my opinion, be reconciled with the principle of separation of powers and the principle of the rule of law, which are two of the most important characteristics of our democratic system. Such a blow to the very heart of our founding narrative cannot stand.

Therefore, I recommend that we hold that in enacting Amendment no. 3 to Basic Law: The Judiciary, the Knesset exceeded its constituent power, and that we therefore declare the Amendment void. I would further recommend that under the circumstances of the matter and given the fundamental issues concerned, there be no order for costs.

The President (emerita)